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United States Attorneys' Bulletin

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EXECUTIVE
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UNITED
STATES
ATTORNEYS

William P. Tyson, Director

Editor-in-Chief: Jason P. Green FTS 633-4024
Editor: Judith C. Campbell FTS 673-6348

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TABLE OF CONTENTS

Page

COMMENDATIONS.. 75

CLEARINGHOUSE
Legal/Policy Advisory on Asset Forfeiture Matters.................. 76

POINTS TO REMEMBER
Bluesheets and Transmittals, United States Attorneys' Manual...... 76
Criminal Tax Indictment/Information Forms and Manual on JURIS..... 77
Redelegation of Authority to U. S. Attorneys in Civil Cases....... 77
Teletypes to United States Attorneys.............................. 78

CASENOTES
OFFICE OF THE SOLICITOR GENERAL................................... 78
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS............... 78
CIVIL DIVISION.. 79
CIVIL RIGHTS DIVISION... 81
LAND AND NATURAL RESOURCES DIVISION............................... 82
UNITED STATES ATTORNEYS' OFFICES.................................. 83
FEDERAL RULES... 84

APPENDIX.. 86

VOL. 34, NO. 3 THIRTY-THIRD YEAR FEBRUARY 14, 1986

Please send change of address to Editor, United States Attorneys'Bulletin, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

COMMENDATIONS

Assistant United States Attorney ANDREW B. BAKER, JR., Northern District of Indiana, was commended by Major Emil D. Brupbacher, Jr., Staff Judge Advocate, United States Air Force, for his work in United States v. 63.69 Acres.

Assistant United States Attorney R. MICHAEL BURKE, District of Hawaii, was commended by Attorney General Edwin Meese III, for his participation in the successful prosecution of twenty-two marijuana growers.

Assistant United States Attorneys VETA M. CARNEY and ROBERT C. PERRY, Southern District of Indiana, were commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for their successful prosecution of Lucille Jacobs.

United States Attorney MAURICE O. ELLSWORTH, District of Idaho, was commended by Mr. Paul Scragg, Vice-President, First Security Bank of Idaho, and Attorney General Edwin Meese III, for his presentation of the Department's policies at the Western States Bank Security Director's Association.

Assistant United States Attorney WILLIAM T. GRIMMER, Northern District of Indiana, was commended by Mr. Paul A. Adams, Inspector General, Department of Housing and Urban Development, for his aggressive approach in fighting fraud and abuse in government programs. Assistant United States Attorney GRIMMER was also commended by Mr. K. C. Weaver, Inspector-in-Charge, United States Postal Service, Chicago, Illinois, for his outstanding prosecution of fourteen defendants involved in a money order fraud scheme at the Indiana State Prison.

Assistant United States Attorney JOHN F. HOEHNER, Northern District of Indiana, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his outstanding work on two cases involving multiple subjects operating "chop shops" in Northwest Indiana.

Assistant United States Attorneys ROBERT A. MANDEL and DAVID L. ZUERCHER, District of South Dakota, was commended by Mr. R. Springfield, Jr., Postal Inspector-in-Charge, United States Postal Service, St. Paul, Minnesota, for their outstanding efforts in the successful conclusion of United States v. Sablosky.

Assistant United States Attorney CHRISTINA M. MCKEE, Northern District of Indiana, was commended by Major Emil D. Brupbacher, Jr., Staff Judge Advocate, United States Air Force, for her work in representing the Air Force in an equal pay case.

Assistant United States Attorney JOSEPH D. NEWMAN, Southern District of Georgia, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his outstanding prosecution of Fred Lee Sykes, Jr.

Assistant United States Attorneys MARGARET M. QUINN and ANN MARIE TRACEY, Southern District of Ohio, were commended by Mr. Terence D. Dinan, Special Agent-in-Charge, Federal Bureau of Investigation, Cincinnati, Ohio, for their outstanding efforts in the successful public corruption trial of Oliver G. McGee.

Assistant United States Attorney MARK D. STUAAN, Central District of Illinois, was commended by Mr. Philip V. Fisher, Special Agent-in-Charge, Drug Enforcement Administration, Chicago, Illinois, for his presentation on the Controlled Substance Act at a Drug Enforcement Administration Law Enforcement Seminar held in East Moline, Illinois.

Assistant United States Attorney ERIC L. WILSON, District of Hawaii, was the recipient of the Federal Bar Association's 1985 Younger Federal Lawyer Award.

CLEARINGHOUSE

Legal/Policy Advisory on Asset Forfeiture Matters

The Asset Forfeiture Office of the Criminal Division prepares advisories on numerous legal/policy issues each month in the course of their regular duties.

Copies of the following advisories may be obtained by contacting the Office of Legal Services, Executive Office for United States Attorneys, at FTS 633-4024:

1) Opinion No. L85-28--Administrative Forfeiture of Real Property; and

2) Opinion No. L85-29--Policy With Regard to Forfeiture of Assets Which Have Been Transferred to Attorneys As Fees for Legal Services.

Please ask for item number CH-27.

(Executive Office)

POINTS TO REMEMBER

Bluesheets and Transmittals, United States Attorneys' Manual.

Updated lists of United States Attorneys' Manual Bluesheets and Transmittals are appended to this Bulletin.

(Executive Office)

Criminal Tax Indictment/Information Forms And Manual On JURIS

In conjunction with the recent publication of its new *Criminal Tax Manual*, the Tax Division announces the creation of two new JURIS files ("CRTAXMAN" and "FORMS") which now are available for searching in the JURIS tax file group. "CRTAXMAN" presently contains the textual portions of the *Criminal Tax Manual* published in October 1985, including Tax Division "Policy and Procedures"; "Title 26 Offenses"; and "Title 18 Offenses." The "Methods of Proof" section of the *Manual*, published in January 1986, will be available for searching in "CRTAXMAN" shortly. "FORMS" contains the Tax Division's revised, standardized, numbered, indictment/information forms as published in the *Manual* for use in prosecuting criminal tax cases. Both "CRTAXMAN" and "FORMS" contain as a document a Table of Contents to facilitate access to materials contained in the files. As new sections of the *Criminal Tax Manual* are published, they will be added to the *Manual* material already available on JURIS.

For additional information concerning the *Manual* or its availability on JURIS, contact Edward M. Vellines, Office of Policy and Tax Enforcement Anaylsis, Criminal Section, Tax Division, on FTS 633-3011.

(Tax Division)

Redelegation Of Authority To United States Attorneys In Civil Cases

Effective December 13, 1985, Deputy Attorney General D. Lowell Jensen authorized United States Attorneys to reject, with respect to all civil matters assigned to their respective offices, any offer in compromise and to accept offers in compromise and close claims or cases in the same manner and to the same extent as Assistant Attorneys General. However, United States Attorneys may not accept any offers in compromise of any claim or case against the United States where the principal amount to be paid by the United States exceeds $200,000. Officials may neither close (other than by compromise or by entry of judgment) any claim or case on behalf of the United States where the gross amount involved exceeds $200,000 nor accept any offers in compromise of any such claim or case in which the difference between the gross amount of the original claim and the proposed settlement exceeds $200,000 or 10 percent of the original claim, whichever is greater.

This authorization supersedes directives of the Antitrust, Civil, Civil Rights, Criminal, Land and Natural Resources, and Tax Divisions only to the extent noted above. All other exceptions, limitations on or conditions of delegations to United States Attorneys contained in such directives or in 28 C.F.R., Part 0 remain in full force and effect.

This authorization applies to all cases or claims pending as of December 13, 1985 (the date of Mr. Jensen's memorandum to United States Attorneys).

(Executive Office)

Teletypes to All United States Attorneys

A listing of recent teletypes sent by the Executive Office is appended to this Bulletin. If a United States Attorney's office has not received one or more of these teletypes, copies may be obtained by contacting the Communications Center, Executive Office for United States Attorneys, at FTS 633-1020.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A brief amicus curiae in Baker v. General Motors Corp., 420 Mich. 463 (1985). The question presented is whether a state statute, barring the payment of unemployment compensation to employees who financed the labor dispute that caused their unemployment, impermissibly conflicts with the right of employees under Section 7 of the National Labor Relations Act "to form, join, or assist labor organizations."

A petition for certiorari in Commissioner v. Groetzinger, 771 F.2d 269 (7th Cir. 1985). The issue is whether a full-time gambler who wagers solely for his own account, and thus does not hold himself out as offering goods or services to others, is engaged in a "trade or business" for federal income tax purposes.

OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES
DECEMBER 12, 1985 - JANUARY 21, 1986

HIGHLIGHTS

Technical Corrections Crime Package. Extensive meetings were held in early December to process our 85-section bill intended to correct deficiencies in the landmark Comprehensive Crime Control Act of 1984. Although a number of provisions in our bill were pulled out so that separate hearings can be held on them, the bulk of the bill, S. 1236, was deemed to be non-controversial and was reported out by the Senate Judiciary Committee on December 12.

Anti-Terrorism Legislation. On December 12, the Senate Judiciary also voted to report Senator Specter's bill, S. 1429, to establish federal criminal jurisdiction over the murder, assault or kidnapping of United States citizens overseas. This proposal is in response to the murders of

Americans in connection with the TWA and Achille Lauro hijackings. The bill as reported reflects changes suggested by the Departments of State and Justice.

Electronic Surveillance Legislation. Representative Kastenmeier and Senators Mathias and Leahy continue to seek legislation to expand the federal wiretap statute, particularly to cover new communications technologies (cellular and cordless telephones, electronic mail, etc.). Their original bills (S. 1667 and H.R. 3870) would, in the Department's view, be harmful to law enforcement. Therefore, we have indicated, in Senate testimony of Deputy Assistant Attorney General James Knapp, that we are prepared to work on compromise legislation. There appears to be the basis for a compromise here. Representative Kastenmeir plans further hearings in February. In the meantime, prospects for legislation in this area are favorable. We are laboring to be constructive on this issue while at the same time avoiding new legislation which would impair investigations of drug trafficking, organized crime, espionage and other such serious offenses which often require use of electronic surveillance techniques.

Armor-Piercing "Cop-Killer" Bullet Legislation. On December 17, the House passed the proposed Law Officers Protection Act, H.R. 3132, by a vote of 400 to 21. The bill bans the sale, manufacture and importation of bullets made to penetrate body armor except those used by government agencies, destined for export, or for authorized testing. The Administration also developed proposed legislation to ban the production or importation of armor-piercing bullets which was submitted to the Congress as a joint Treasury-Justice proposal. However, as noted above, H.R. 3132 expands the scope of the legislation to cover sales as well as production or importation. We oppose this extension as unenforceable.

CIVIL DIVISION

D.C. CIRCUIT HOLDS FORMER PATIENTS EMPLOYED IN "EXCEPTED SERVICE" POSITIONS AT ST. ELIZABETH'S HOSPITAL MUST BE AFFORDED JOB BENEFITS AND PROTECTIONS EQUIVALENT TO THOSE AVAILABLE TO COMPETITIVELY HIRED WORKERS.

In this class action, plaintiffs were former patients of St. Elizabeth's Hospital (the only federal mental institution) who were employed at the hospital under the authority of 5 C.F.R. §213.3102(h) ("subsection (h)"). This regulation permitted former patients of federal mental institutions to be hired for jobs at the institution without going through the normal competitive hiring process for federal employment. As "excepted service" employees, these workers did not have all of the same job benefits and protections as members of the "competitive service." Plaintiffs argued that the failure to afford them equivalent benefits when they were performing the same jobs as competitively hired workers violated the Rehabilitation Act. The district court agreed and ordered that members of the class who had completed two years of satisfactory service in their subsection (h) positions be converted to competitive status. On appeal we argued that plaintiffs' excepted service status reflected their voluntary choice and that unless the competitive hiring process discriminated against recovered mental patients, provision of an alternative route to federal employment did not violate the Rehabilitation Act.

The D.C. Circuit has now affirmed the lower court's finding that denial of equivalent job benefits and protections does violate the Act, but has remanded the case to the district court to revise one critical part of the remedy. The court of appeals was concerned about the possibility that recovered patients could have recurring mental problems and found that the government had a legitimate interest in preserving its ability to remove these employees from their positions if their mental condition deteriorated. Accordingly, the court directed the district court fashion a remedy concerning job tenure which preserved the hospital's flexibility to set reasonable rules which accommodate this interest.

Allen v. Heckler, ___F.2d___, No. 84-5612 (D.C. Cir. Dec. 31, 1985). D. J. # 35-16-2036.

Attorneys: William Kanter (Civil Division) FTS 633-1597; Irene M. Solet (Civil Division) FTS 633-3355.

FIFTH CIRCUIT VACATES EARLIER OPINION AND HOLDS THAT HUD CAN ENFORCE JUDGMENTS WITH CONTEMPT ORDERS.

In this case, HUD brought suit against four corporate and individual defendants alleging violations of the Interstate Land Sales Full Disclosure Act. The Act, which is patterned after the Securities Act of 1933, protects against fraud and nondisclosure by land developers. Defendants agreed to a consent judgment by which they would make restitution to allegedly defrauded purchasers in three annual installments. When defendants failed to make the agreed payments, HUD obtained a civil contempt order imposing fines for continued noncompliance.

Defendants appealed and the Fifth Circuit reversed the judgment of contempt, holding that the contempt order violated the prohibition against imprisonment for debt contained in 28 U.S.C. §2007(a). The court stated that the threat of imprisonment was inherent in the order, and that the consent judgment was a money judgment falling within the scope of the statute. The opinion thus effectively barred HUD from enforcing judgments by the use or threatened use of contempt sanctions, and raised the possibility that other agencies enforcing similar statutes would encounter the same bar.

We filed for rehearing and the panel vacated its original opinion. In its new opinion, the court recognized that the consent order in this case was not a money judgment, but an equitable order compelling restitution to correct an offense against the public interest. Accordingly, 28 U.S.C. §2007(a) did not apply and the consent judgment was properly enforceable by contempt. At our suggestion, the panel remanded the case to permit the district court to determine whether the defendants are currently able to comply with the terms of the order.

Pierce v. Vision Investments, Inc., ___F.2d___, No. 84-1642 (5th Cir. Jan. 3, 1986). D. J. # 36-76-204.

Attorneys: John F. Cordes (Civil Division) FTS 633-3380; Mark B. Stern (Civil Division) FTS 633-5534.

NINTH CIRCUIT REVERSES DISTRICT COURT JUDGMENT ESTOPPING THE GOVERNMENT.

The plaintiff brought a successful suit in district court claiming that a 58-month delay by the Immigration and Naturalization Service (INS) in processing her application for change of status to permanent resident alien constituted "affirmative misconduct" sufficient to estop the government from deporting her. We took an appeal, arguing that the delay was at worst mere negligence and could not be elevated to affirmative misconduct. We also argued that the elements required for an estoppel, including reasonable reliance, were missing in this case.

The Ninth Circuit agreed and reversed, holding that simple delay by INS was not affirmative misconduct, and that any of its earlier decisions so holding, including Villena v. INS, 622 F.2d 1352 (9th Cir. 1980) and Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976) had been overruled by INS v. Miranda, 459 U.S. 14 (1982).

Jaa v. Immigration And Naturalization Service, ___F.2d___, No. 85-1516 (9th Cir. Jan. 3, 1986). D. J. # 39-11-1994.

Attorneys: Barbara L. Herwig (Civil Division) FTS 633-5425; Richard A. Olderman (Civil Division) FTS 633-4052.

CIVIL RIGHTS DIVISION

SIXTEEN-COUNT INDICTMENT RETURNED AGAINST KLAN MEMBERS IN TWO NORTH CAROLINA COUNTIES.

A federal grand jury returned a 16-count indictment against twelve defendants in this case which involves incidents of intimidation which occurred in 1982 and 1983, including cross burnings and racially motivated assaults and shootings--at the hands of Ku Klux Klan members in Iredell and Alexander Counties, North Carolina. The indictment charges that the defendants conspired to intimidate several black and white residents who lived or socialized together in the two counties. Some of the defendants are also charged with perjury in denying before a grand jury that they knew of or were involved in the cross burnings. Previously nine other individuals have either pled guilty or been convicted for their involvement in these same incidents.

United States v. Earp, ___ F. Supp. ___, No. ST-CR-86-2 (W.D. N.C. Jan. 7, 1986). D. J. # 175-55-84.

Attorney: Isabelle Thabault (Civil Rights Division) FTS 633-4147.

FOUR PERSONS CHARGED WITH CONSPIRACY TO INTERFERE WITH HOUSING AND DESTRUCTION OF GOVERNMENT PROPERTY.

Arrests were made and a complaint was filed in this case in which four defendants, including a juvenile, were charged with violations of 18 U.S.C. §241 (conspiracy to interfere with housing rights) and 18 U.S.C. §844(f) (destruction of government property). A federal grand jury heard testimony on January 9, 1986, and additional testimony was heard on January 16, 1986. The case involves acts of intimidation and vandalism directed at a black couple after they moved into a house in the southwest Philadelphia area. On December 12, 1985, after the couple moved out of the house, it was destroyed by fire along with several adjoining houses. The house was owned by the Veterans Administration. Preliminary reports indicate that the fire was an arson resulting from the pouring and lighting of gasoline on the house. This matter is being handled by the United States Attorney's Office.

United States v. Stewart, ___ F. Supp. ___, No. 86-4 (E.D. Pa. Case filed Jan. 7, 1986). D. J. # 175-62-166.

Attorney: Albert Glenn (Civil Rights Division) FTS 633-4853.

LAND AND NATURAL RESOURCES DIVISION

UNITED STATES OWNS TITLE TO BED OF UTAH LAKE.

Utah commenced this quiet title action, under 28 U.S.C. §2409a, after the Interior Department began to issue federal oil and gas leases on the bed of Utah Lake. Utah unsuccessfully contended that ownership of the bed of this navigable lake passed to it when it attained statehood in 1896. The court of appeals, in affirming a summary judgment quieting title to the bed of Utah Lake in the United States, held that the United States, through the Director of the Geological Survey, had withdrawn the lake bed as a reservoir site before statehood pursuant to an 1888 federal statute authorizing such withdrawals. This withdrawal effectively precluded the State from acquiring any ownership of the lake bed or any lesser interest in its mineral estate upon its admission to the Union. The court of appeals further held that the Submerged Lands Act of 1953, by its terms, did not produce a belated conveyance to the State. At oral argument, the State disclaimed that it was invoking estoppel by the government in support of its claim, and the court of appeals expressly refused to reach that issue.

State of Utah v. United States, ___F.2d___, No. 83-1731 (10th Cir. Dec. 26, 1985). D. J. # 90-1-5-1929.

Attorney: Dirk D. Snel (Land and Natural Resources Division) FTS 633-4400.

ANTI-DISCRIMINATION PROVISION IN SECTION 703 OF SURFACE MINING CONTROL AND RECLAMATION ACT DOES NOT APPLY TO STATES.

Section 703 of the Surface Mining Control and Reclamation Act states that "no person" shall discharge or otherwise discriminate against an employee due to his efforts to enforce or testify under the Act. The court of appeals, affirming the district court and the Interior Board of Land Apeals, held that a state agency is not a "person" within the meaning of this provision. The court noted that a state would not be subject to this employee-protection provision even if it were engaged in coal mining, since the Act only subjects states engaged in mining to the performance standards found in Title V of the Act.

Leber v. Pennsylvania Dept. of Environmental Resources, ___F.2d___, No. 85-5166 (3d Cir. Jan. 6, 1986). D. J. # 90-1-18-3919.

Attorneys: David C. Shilton (Land and Natural Resources Division) FTS 633-5580; Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2762.

UNITED STATES ATTORNEYS' OFFICES

EASTERN DISTRICT OF VIRGINIA

FOURTH CIRCUIT AFFIRMS DISTRICT COURT INJUNCTION FREEZING DEFENDANT'S $250,000 APPEAL BOND IN CRIMINAL CASE TO PRESERVE FUND TO SATISFY ANY JUDGMENT ENTERED IN SUBSEQUENT CIVIL CASE BASED ON SAME FACTS AS CRIMINAL PROSECUTION.

Defendant physician was convicted in 1983 on 35 mail fraud and related counts arising from a scheme to defraud Medicaid and Champus by submitting false claims for medical services not actually performed. Defendant appealed and bond was set at $50,000. At a subsequent bond revocation hearing, testimony established defendant had converted real estate into large amounts of cash, had deposited cash at various institutions in amounts calculated to avoid Currency Transaction Reports, placed some cash in the custody of third persons, falsely identified himself to bank officials, and attempted to purchase bearer bonds in a third person's name. The court increased the appeal bond to $250,000 rather than revoking the bond.

In 1985, just before defendant's conviction was affirmed, we filed a False Claims Act suit and contemporaneously a motion for pre-judgment attachment of the appeal bond, citing as authority Federal Rules of Civil Procedure 64, 65 and the All Writs Act. The district court issued an injunction, based on the bond revocation hearing testimony, freezing the appeal bond, rejecting defendant's argument that appeal bonds are sacrosanct and must be returned to the defendant pursuant to Federal Rules of Criminal Procedure 46(f) at the conclusion of the appeal. Defendant appealed the issuance of the injunction, arguing Federal Rules of Civil Procedure 64 incorporating state law was the exclusive basis for a pre-judgment attachment.

The Fourth Circuit affirmed, noting the state law requirements for pre-judgment attachment are less onerous than those prescribed for an injunction by Rule 65 of the Federal Rules of Civil Procedure, and in any event the district court's findings also satisfied the Rule 64 requirements.

United States v. Alexander, ___ F.Supp.___, Civil Action No. 85-373-N (E.D. Va. Dec. 26, 1985).

Attorney: S. David Schiller (Assistant United States Attorney, Eastern District of Virginia) FTS 925-2186.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11(e). Pleas. Plea Agreement Procedure.

Rule 48(a). Dismissal. By Attorney for Government.

After the grand jury returned an indictment charging a company and one of its employees with three counts of submitting false claims to the government, a proposed plea agreement was submitted to the court providing that the company would plead guilty to all charges while the counts against the employee would be dismissed. A motion for such dismissal was presented to the court along with the plea agreement. The district court rejected this agreement. On appeal, the government argued that the court in effect issued two orders, one rejecting the proposed plea agreement under Rule 11(e) and one denying a Rule 48(a) motion to dismiss the indictment. By the court's refusal to accept the agreement, the prosecutor's authority to dismiss under Rule 48(a) was infringed. While the government concedes that the prosecutor's power to dismiss is not absolute, a court's discretion to refuse to grant a dismissal is limited.

The court of appeals held that a court's rejection of a proposed plea bargain, which also provided for dismissal of all charges against a codefendant, is governed by Rule 11(e). Rule 48(a) governing dismissals does not apply. Since the dismissal provision and the plea agreement were one package, the court's rejection of the package must be given deference reflecting the broad discretion judges have under Rule 11 rather than their more limited authority under Rule 48.

(Affirmed.)

United States v. Honorable Jim R. Carrigan, ___F.2d___, No. 85-1530 (10th Cir. Dec. 3, 1985).

LISTING OF ALL BLUESHEETS IN EFFECT
FEBRUARY 14, 1986

AFFECTS USAM	TITLE NO.	DATE	SUBJECT
9-1.177	TITLE 9	12/31/85	Authorization for Negotiated Concessions in Organized Crime Cases
9-2.132	TITLE 9	12/31/85	Policy Limitations on Institution of Proceedings - Internal Security Matters
9-2.133*	TITLE 9	4/09/84	Policy Limitation on Institution of Proceedings, Consultation Prior to Institution of Criminal Charges
9-2.151	TITLE 9	12/31/85	Policy Limitations - Prosecutorial and Other Matters, International Matters
9-2.160*	TITLE 9	7/18/85	Policy with Regard to Issuance of Subpoenas to Attorneys for Information Relating to the Representation of Clients
9-6.400*	TITLE 9	11/06/85	Pretrial Detention Hearing Reporting Requirements
9-8.250*	TITLE 9	8/16/85	Policy Concerning Application of Youth Corrections Act to Offenses Committed before Oct. 12, 1984
9-18.280*	TITLE 9	8/09/85	Policy Concerning Application of Insanity Defense Reform Act of 1984 Offenses. Committed Before Date of Enactment
9-21.340 to 9-21.350*	TITLE 9	3/12/84	Psychological/Vocational Testing; Polygraph Examinations for Prisoner-Witness Candidates
9-40.400*	TITLE 9	7/15/85	Policy Concerning Prosecution Under New Bank Bribery Statute (18 U.S.C. §215)
9-48.120*	TITLE 9	3/07/85	Computer Fraud-Reporting Requirements

* Approved by Advisory Committee, being permanently incorporated.
** In printing.

LISTING OF ALL BLUESHEETS IN EFFECT
FEBRUARY 14, 1986

AFFECTS USAM	TITLE NO.	DATE	SUBJECT
9-49.150; 9-49.160*	TITLE 9	3/22/85	18 U.S.C. §1029-Reporting Requirements; Fraudulent Use of Credit Cards and Debit Instruments-Prosecutions Under 18 U.S.C. §1029 Statutes in Title 15
9-60.291; 9-60.292*	TITLE 9	8/16/85	Interception of Radio Communications: Unauthorized Reception of Cable Service
9-90.330*	TITLE 9	5/06/85	Computer Espionage
9-90.600*	TITLE 9	5/06/85	Registration
9-103.130	TITLE 9	12/31/85	Revision to the Investigative and Prosecutive Guidelines for the Controlled Substance Registrant Protection Act
9-111.000*	TITLE 9	9/18/85	Policy with Regard to Forfeiture of Assets Which Have Been Transferred to Attorneys As Fees For Legal Services
9-131.030*	TITLE 9	4/09/84	Consultation Prior to Prosecution
9-131.110*	TITLE 9	4/09/84	Hobbs Act Robbery
9-134.010*	TITLE 9	2/20/85	Investigative Jurisdiction: 18 U.S.C. §1954
10-2.186	TITLE 10	9/27/85	Grand Jury Reporters
10-6.213*	TITLE 10	11/22/85	Reporting of Immediate Declinations of Civil Referrals

UNITED STATES ATTORNEYS' MANUAL--TRANSMITTALS

The following United States Attorneys' Manual Transmittals have been issued to date in accordance with USAM 1-1.500.

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 1	(Transmittals A2 through A10 have been superseded.)			
	A11	2/22/84	2/10/84	Complete revision of Ch. 1, 2
	A12	3/19/84	2/17/84	Complete revision of Ch. 4
	A13	3/22/84	3/9/84	Complete revision of Ch. 8
	A14	3/23/84	3/9 & 3/16/84	Complete revision of Ch. 7, 9
	A15	3/26/84	3/16/84	Complete revision of Ch. 10
	A16	8/31/84	3/02/84	Complete revision of Ch. 5
	A17	3/26/84	3/26/84	Complete revision of Ch. 6
	A18	3/27/84	3/23/84	Complete revision of Ch. 11, 13, 14, 15
	A19	3/29/84	3/23/84	Complete revision of Ch. 12
	A20	3/30/84	3/23/84	Index to Title 1, Table of Contents to Title 1
	A21	4/17/84	3/23/84	Complete revision of Ch. 3
	A22	5/22/84	5/22/84	Revision of Ch. 1-6.200
	AAA1	5/14/84		Form AAA-1
	B1	7/01/85	8/31/85	Revision to Ch. 1-12.000
	B2	8/31/85	7/01/85	Revisions to Ch. 11
TITLE 2	(Transmittals A2 through A4 have been superseded.)			
	A5	2/10/84	1/27/84	Complete revision of Title 2- replaces all previous transmittals

*Transmittal is currently being printed.

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 2	A11	3/30/84	1/27/84	Summary Table of Contents to Title 2
	AAA2	5/14/84		Form AAA-2
TITLE 3	(Transmittal A2 has been superseded.)			
	A3	10/11/83	8/4/83	Complete revision of Title 3-replaces all previous transmittals
	AAA3	5/14/84		Form AAA-3
TITLE 4	(Transmittals A2 through A6 have been superseded.)			
	A7	4/16/84	3/26/84	Complete revision of Ch. 7, 8, 12
	A8	4/16/84	3/28/84	Complete revision of Ch. 2, 14, 15
	A9	4/23/84	3/28/84	Complete revision of Ch. 3
	A10	4/16/84	3/28/84	Complete revision of Ch. 10
	A11	4/30/84	3/28/84	Complete revision of Ch. 1, 9, Index to Title 4
	A12	4/21/84	3/28/84	Complete revision of Ch. 6
	A13	4/30/84	3/28/84	Complete revision of Ch. 4
	A14	4/10/84	3/28/84	Complete revision of Ch. 13
	A15	3/28/84	3/28/84	Complete revision of Ch. 5
	A16	4/23/84	3/28/84	Complete revision of Ch. 11
	AAA4	5/14/84		Form AAA-4
	B1	11/05/85	8/01/85	Revisions to Chapters 1-8, and 11-15
TITLE 5	(Transmittal A2 has been superseded.)			
	A3	3/22/84	3/5/84	Complete revision of Ch. 1, 2, 3 (was 2A)

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 5	A4	3/28/84	3/12/84	Complete revision of Ch. 12 (was 9C)
	A4	undated	3/19/84	Complete revision of Ch. 5 (was Ch. 4), 6, 8
	A5	3/28/84	3/20/84	Complete revision of Ch. 9, 11 (was 9B)
	A6	3/28/84	3/22/84	Complete revision of Ch. 7
	A7	3/30/84	3/20/84	Complete revision of Ch. 10 (was 9A)
	A8	4/3/84	3/22 & 3/26/84	Complete revision of Ch. 13, 14, 15, Table of Contents to Title 5
	A9	12/06/84	11/01/84	Revisions to Chapter 1
	A11	4/17/84	3/28/84	Complete revision of Ch. 4 (was Ch. 3)
	A12	4/30/84	3/28/84	Index to Title 5
	AAA5	5/14/84		Form AAA-5
	B1	6/03/85	5/01/85	Revisions to Ch. 1 and Ch. 4
TITLE 6	A2	3/23/84	3/2/84	Complete revision of Title 6-replaces all prior transmittals
	A3	12/19/84	12/14/84	Revision to Ch. 4 and Index
	AAA6	5/14/84		Form AAA-6
TITLE 7	(Transmittals A2 and A3 have been superseded.)			
	A4	1/6/84	11/22/83	Complete revision to Title 7-replaces all prior transmittals
	A12	3/3/84	12/22/83	Summary Table of Contents to Title 7
	AAA7	5/14/84		Form AAA-7

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 8	AAA8	5/14/84		Form AAA-8
	B1	10/01/85	6/01/85	Complete revision to Title 8 (Supersedes A1, A2, and A12
TITLE 9	(Transmittals A5 through A12, A14, A47, A49 A50, A56 and A61 have been superseded.)			
	A13	1/26/84	1/11/84	Complete revision of Ch. 132, 133
	A14	2/10/84	1/27/84	Revisions to Ch. 1 (Superseded by A78)
	A15	2/1/84	1/27/84	Complete revision of Ch. 8
	A16	3/23/84	2/8/84	Complete revision of Ch. 135, 136
	A17	2/10/84	2/2/84	Complete revision of Ch. 39
	A18	2/3/84	2/3/84	Complete revision of Ch. 40
	A19	3/26/84	2/24/84	Complete revision of Ch. 21
	A20	3/23/84	2/8/84	Complete revision of Ch. 137, 138
	A21	3/19/84	2/13/84	Complete revision of Ch. 34
	A22	3/30/84	2/01/84	Complete revision of Ch. 14
	A23	8/31/84	2/16/84	Revisions to Ch. 2
	A24	3/23/84	2/28/84	Complete revision of Ch. 65
	A25	3/26/84	3/7/84	Complete revision of Ch. 130
	A26	3/26/84	2/8/84	Complete revision of Ch. 44
	A27	3/26/84	3/9/84	Complete revision of Ch. 90
	A28	3/29/84	3/9/84	Complete revision of Ch. 101
	A29	3/26/84	3/9/84	Complete revision of Ch. 121
	A30	3/26/84	3/19/84	Complete revision of Ch. 9

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A31	3/26/84	3/16/84	Complete revision of Ch. 78
	A32	3/29/84	3/12/84	Complete revision of Ch. 69
	A33	3/29/84	3/9/84	Complete revision of Ch. 102
	A34	3/26/84	3/14/84	Complete revision of Ch. 72
	A35	3/26/84	2/6/84	Complete revision of Ch. 37
	A36	3/26/84	2/6/84	Complete revision of Ch. 41
	A37	4/6/84	2/8/84	Complete revision of Ch. 139
	A38	3/29/84	2/28/84	Complete revision of Ch. 47
	A39	3/30/84	3/16/84	Complete revision of Ch. 104
	A40	4/6/84	3/9/84	Complete revision of Ch. 100
	A41	4/6/84	3/9/84	Complete revision of Ch. 110
	A42	3/29/84	3/14/84	Complete revision of Ch. 64
	A43	4/6/84	3/14/84	Complete revision of Ch. 120
	A44	4/5/84	3/21/84	Complete revision of Ch. 122
	A45	4/6/84	3/23/84	Complete revision of Ch. 16
	A46	2/30/84	2/16/84	Complete revision of Ch. 43
	A47	4/16/84	3/28/84	Revisions to Ch. 7 (Superseded by A63)
	A48	4/16/84	3/28/84	Complete revision of Ch. 10
	A49	4/16/84	3/28/84	Revisions to Ch. 63 (Superseded by A74)
	A50	4/16/84	3/28/84	Revisions to Ch. 66 (Superseded by A60)
	A51	4/6/84	3/28/84	Complete revision of Ch. 76, deletion of Ch. 77
	A52	4/16/84	3/30/84	Complete revision of Ch. 85

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A53	6/6/84	3/28/84	Revisions to Ch. 4
	A54	7/25/84	6/15/84	Complete revision of Ch. 11
	A55	4/23/84	4/6/84	Complete revision of Ch. 134
	A56	4/30/84	3/28/84	Revisions to Ch. 42 (Superseded by A87)
	A57	4/16/84	3/28/84	Complete revision of Ch. 60, 75
	A58	4/23/84	4/19/84	Summary Table of Contents of Title 9
	A59	4/30/84	4/16/84	Entire Index to Title 9
	A60	5/03/84	5/03/84	Complete revision of Ch. 66 (Supersedes A50)
	A61	5/03/84	4/30/84	Revisions to Ch. 1, section .103 (Superseded by A78)
	A62	12/31/84	12/28/84	Revisions to Ch. 123
	A63	5/11/84	5/9/84	Complete revision to Ch. 7 (Supersedes A47)
	A64	5/11/84	5/11/84	Revision to Ch. 64, section .400-700
	A65	5/17/84	5/17/84	Revisions to Ch. 120
	A66	5/10/84	5/8/84	Complete revision to Ch. 131
	A67	5/11/84	5/09/84	Revisions to Ch. 121, section .600
	A68	5/28/84	5/08/84	Revisions to Ch. 104
	A69	5/09/84	5/07/84	Revisions to Ch. 21, section .600
	A70	5/17/84	5/16/84	Revisions to Ch. 43, section .710
	A71	5/21/84	5/21/84	Complete revision of Ch. 20
	A72	5/25/84	5/23/84	Complete revision of Ch. 61

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A73	6/18/84	6/6/84	Complete revision of Ch. 17
	A74	6/18/84	6/7/84	Complete revision of Ch. 63 (Supersedes A49)
	A75	6/26/84	6/15/84	Complete revision of Ch. 27
	A76	6/26/84	6/15/84	Complete revision of Ch. 71
	A77	7/27/84	7/25/84	Complete revision of Ch. 6
	A78	9/10/84	8/31/84	Complete revision of Ch. 1 (Supersedes A14 and A61)
	A79	8/02/84	7/31/84	Complete revision of Ch. 18
	A80	8/03/84	8/03/84	Complete revision of Ch. 79
	A81	8/06/84	7/31/84	Revisions to Ch. 7
	A82	8/02/84	7/31/84	Revisions to Ch. 75
	A83	8/02/84	7/31/84	Revisions to Ch. 90
	A84	9/10/84	9/7/84	Complete revision of Ch. 2
	A85	7/25/84	2/17/84	Revisions to Ch. 136
	A86	8/02/84	7/31/84	Revisions to Ch. 60
	A87	11/14/84	11/09/84	Revisions to Ch. 42 (Supersedes A56)
	A88	8/31/84	8/24/84	Complete revision of Ch. 12
	A89	12/31/84	12/31/84	Complete revision of Ch. 4
	A90	10/10/84	10/01/84	Complete revision of Ch. 73
	A91	12/12/84	11/23/84	Revisions to Ch. 70
	A92	12/14/84	11/09/84	Revisions to Ch. 75
	A93	12/31/84	12/06/84	Revisions to Ch. 7
	A94	12/20/84	12/14/84	Correction to Ch. 27
	AAA9	5/14/84		Form AAA-9

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	B1	3/15/85	01/31/85	Revisions to Ch. 60
	B2	3/29/85	01/31/85	Revisions to Ch. 61
	B3	3/29/85	01/31/85	Revisions to Ch. 71
	B4	6/24/85	4/01/85	Revisions to Ch. 63
	B5	6/24/85	4/04/85	Revisions to Ch. 11
	B6	6/27/85	4/01/85	Revisions to Ch. 139
	B7	6/27/85	5/01/85	Revisions to Ch. 12
	B8	7/01/85	4/01/85	Revision to Ch. 4
	B9	7/31/85	7/31/85	Revision to Ch. 130
	B11	9/27/85	7/01/85	Revision to Ch. 27 and Ch. 38
	B12	9/27/85	7/01/85	Revision to Ch. 2
	B13	10/01/85	7/01/85	Revision to Ch. 60
	B14	11/29/85	8/01/85	Revision to Ch. 2
	B15	10/21/85	7/01/85	Revision to Ch. 75
	B16	10/22/85	7/01/85	Revision to Ch. 64
	B17	10/21/85	8/30/85	Revision to Ch. 136
	B18	10/21/85	8/01/85	Revision to Ch. 63
	B19	11/05/85	8/01/85	Revision to Ch. 133
	B20	11/01/85	8/30/85	Revision to Ch. 134
	B21	11/05/85	8/01/85	Revision to Ch. 11
	B23	11/20/85	11/05/85	Revision to Ch. 71
	B24	11/20/85	11/05/85	Revision to Ch. 46
	B26	11/29/85	8/01/85	Revision to Ch. 138
	B28	11/29/85	8/01/85	Revision to Ch. 65

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	B29	11/01/85	11/05/86	Revision to Ch. 103
	B31	11/01/85	8/01/85	Revision to Ch. 7
	B33	11/01/85	8/01/85	Revision to Ch. 69
	B35	12/31/85	8/01/85	Revision to Ch. 132
	B36	11/29/85	8/01/85	Revision to Ch. 110
	B39	11/29/85	11/05/85	Revision to Ch. 60
TITLE 10	(Transmittal A2 through A7 have been superseded.)			
	A8	4/5/84	3/24/84	Complete revision of Ch. 1
	A9	4/6/84	3/20/84	Complete revision of Ch. 7
	A10	4/13/84	3/20/84	Complete revision of Ch. 5
	A11	3/29/84	3/24/84	Complete revision of Ch. 6
	A12	4/3/84	3/24/84	Complete revision of Ch. 8
	A13	9/4/84	3/26/84	Complete revision of Ch. 10
	A14	4/23/84	3/28/84	Complete revision of Ch. 4
	A15	4/17/84	3/28/84	Complete revision of Ch. 3, 9
	A16	5/4/84	3/28/84	Index and Appendix to Title 10
	A17	3/30/84	3/28/84	Summary Table of Contents to Title 10
	A18	5/4/84	4/13/84	Complete revision to Ch. 2
	A19	5/02/84	5/01/84	Revisions to Ch. 4
	A20	8/31/84	5/24/84 & 7/31/84	Revisions to Ch. 2
	A21	6/6/84	5/1/84	Corrected TOC, Ch. 4 and pages 23, 24
	A22	7/30/84	7/27/84	Revision to Ch. 2

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 10	A23	8/02/84	7/31/84	Revision to Ch. 2
	A24	11/09/84	10/19/84	Revision to Ch. 2
	A25	11/09/84	10/19/84	Revision to Ch. 2
	A26	11/28/84	11/28/84	Revision to Ch. 2
	A27	12/07/84	11/01/84	Revision to Ch. 2
	AAA10	5/14/84		Form AAA-10
	B1	3/15/85	1/31/85	Revision to Ch. 2
	B2	5/31/85	5/01/85	Revision to Ch. 2
	B3	6/27/85	4/01/85	Revision to Ch. 2
	B4	7/23/85	4/01/85	Revision to Ch. 4
	B7	7/31/85	5/01/85	Revision to Ch. 2 Appendix--Form Index
	B8	11/01/85	8/16/85	Revisions to Ch. 2 and Ch. 8
	B9	11/01/85	8/16/85	Revision to Ch. 2
	B10	11/29/85	8/21/85	Revision to Ch. 2
	B11	11/29/85	8/16/85	Revision to Ch. 2
	B12	11/29/85	8/1/85	Revision to Ch. 2
	B14	11/29/85	8/1/85	Revision to Ch. 2
TITLE 1-10	A1	4/25/84	4/20/84	Index to USAM

If you have any questions regarding the above, please contact Judy Beeman at FTS 673-6348.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
TELETYPES TO ALL UNITED STATES ATTORNEYS

01-21-86	From Richard L. DeHaan, Director, Office of Administration and Review, by Ronald J. Vincoli, Assistant Director, Personnel Management Staff, re: "Requests for Appointment."
01-22-86	From Richard L. DeHaan, Director, Office of Administration and Review, by Ronald J. Vincoli, Assistant Director, Personnel Management Staff, re: "Personnel Management Staff Assignments."
01-23-86	From William P. Tyson, Director, by Jason P. Green, Director, Office of Legal Services, re: "Model Rules Governing Complaints of Judicial Misconduct and Disability with Comment"--Ninth Judicial Circuit.
01-30-86	From William P. Tyson, Director, by Richard L. DeHaan, Director, Office of Administration and Review, re: "Relocation Expenses."

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EXECUTIVE
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William P. Tyson, Director

Editor-in-Chief: Jason P. Green FTS 633-4024
Editor: Judith C. Campbell FTS 673-6348

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TABLE OF CONTENTS

Page

COMMENDATIONS 101

POINTS TO REMEMBER
- Coordination Of United States Attorneys' Offices Surveys 102
- Personnel 103
- Teletypes To All United States Attorneys 103

CASENOTES
- OFFICE OF THE SOLICITOR GENERAL 103
- CIVIL DIVISION 104
- LAND AND NATURAL RESOURCES DIVISION 114
- UNITED STATES ATTORNEYS' OFFICES 116

APPENDIX 117

VOL. 34, NO. 4 THIRTY-THIRD YEAR FEBRUARY 28, 1986

Please send change of address to Editor, United States Attorneys'Bulletin, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530

COMMENDATIONS

Assistant United States Attorneys VETA M. CARNEY and ROBERT C. PERRY, Southern District of Indiana, were nominated for the Army and Air Force Exchange Service Certificate of Appreciation and commended by Colonel Larry B. Hughes, Director, Safety and Security, United States Air Force, for their successful prosecution of a complex employee fraud/theft case.

Assistant United States Attorney SUZANNE B. CONLON, Northern District of Illinois, was commended by Mr. James R. Reeves, Special Agent-in-Charge, Bureau of Alcohol, Tobacco, and Firearms, Department of Treasury, for her successful prosecution of two Chicago firefighers for arson and conspiracy.

Assistant United States Attorney RICHARD H. DEANE, Northern District of Georgia, was commended by Mr. William M. VonRaab, Commissioner of Customs, United States Customs Service, for his successful prosecution of the Atlanta Foreign Trade Zone operator Walter C. Loesche.

Assistant United States Attorneys ROGER W. DOKKEN, KAREN KOTHE, and VIRGINIA A. MATHIS, District of Arizona, were commended by Mr. Herbert H. Hawkins, Jr., Special Agent-in-Charge, Phoenix, Arizona, for their participation in a moot court training session on January 18, 1986.

Assistant United States Attorney MIRIAM WANSLEY DUKE, Middle District of Georgia, has been presented the prestigious Younger Federal Lawyer Award by the Federal Bar Association for her outstanding service to the United States and for her achievement in the federal legal profession. In November 1985, Assistant United States Attorney DUKE also was presented a Certificate of Appreciation for Outstanding Public Service by the Federal Bureau of Investigation.

Assistant United States Attorney ROBERT E. L. EATON, District of Columbia, was commended by Mr. Lawrence F. Watson, Acting Chief Counsel, Goddard Space Flight Center, National Aeronautics and Space Administration, for his excellent prosecution of TRI-COM v. NASA. Assistant United States Attorney EATON also was commended by Ms. Mary F. Wieseman, Inspector General, Small Business Administration, for his fine work, advice, and counsel during the investigation and trial of Trout v. Sanders.

Assistant United States Attorneys JOHN S. GRAHAM and R. CHRISTOPHER LOCKE, Northern District of California, were commended by Mr. Joseph E. Krueger, Special Agent-in-Charge, Drug Enforcement Administration, San Francisco, California, for their excellent assistance in the successful conclusion of the Millerstrom case.

Assistant United States Attorney MEL S. JOHNSON, Eastern District of Wisconsin, was commended by Mr. Elliot E. Lieb, Chief, Criminal Investigation Division, Internal Revenue Service, Milwaukee, Wisconsin, for his successful prosecution of United States v. Calarco and Machi.

Assistant United States Attorney R. CRAIG LAWRENCE, District of Columbia, was commended by Mr. James H. Thessin, Assistant Legal Adviser for Management, Department of State, for his excellent work in United States v. Lipkin.

Assistant United States Attorneys DAVID F. LEVI and GEORGE L. O'CONNELL, Eastern District of California, were commended by Mr. L. R. McIntire, Inspector-in-Charge, United States Postal Service, for their successful prosecution of United States v. Alprin.

Attorneys WILLIAM S. LYNCH, Senior Counsel for Litigation, and PETER C. SPRUNG, Organized Crime and Racketeering Section, Criminal Division, were commended by United States Attorney Joseph S. Cage, Jr., Western District of Louisiana, for their outstanding work in the successful prosecution of United States v. Carlock.

Assistant United States Attorney G. FRANK NOONAN, JR., District of Oregon, was commended by Mr. J. Brian Hyland, Inspector General, Department of Labor, for his excellent help to the San Francisco Regional office in combatting Unemployment Insurance fraud.

Assistant United States Attorney MICHAEL V. RASMUSSEN, Northern District of Alabama, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his successful prosecution of the 20-member "Dawson Gang."

Assistant United States Attorney ROBERT SELDON, District of Columbia, was commended by Mr. John J. Kelleher, Chief Counsel, United States Secret Service, for his excellent work in Rodriquez v. Department of Treasury.

Assistant United States Attorney JAMES E. WHITE, Eastern District of California, was commended by Major General Willard A. Shank, The Adjutant General, State of California, for his successful resolution of Sebra v. Neville.

POINTS TO REMEMBER

Coordination of United States Attorneys' Offices Surveys

United States Attorneys' offices personnel should be aware that by Order of the Attorney General (DOJ Order No. 2810.1, dated June 13, 1980), all surveys, questionnaires, or requests for information sought from one or more United States Attorneys' offices by Department of Justice offices, boards, divisions, field offices, or bureaus, or by other persons or organizations outside the Department, including the private sector, or other United States Government offices, Members of Congress or Committees, or the General Accounting Office (see USAM 1-8.300), should be submitted to the Executive Office for United States Attorneys for coordination. If a United States Attorney's office receives such surveys, questionnaires or requests for information which have not been coordinated with the Executive Office for United States Attorneys, or if assistance is needed in responding, please contact the Office of Legal Services, Executive Office for United States Attorneys (FTS 633-4024) to whom all surveys should be referred.

(Executive Office)

Personnel

Effective February 1, 1986, Larry D. Thompson resigned as United States Attorney for the Northern District of Georgia.

Effective February 1, 1986, Stephen S. Cowen was court appointed United States Attorney for the Northern District of Georgia.

Effective February 6, 1986, Breckinridge L. Willcox was court appointed United States Attorney for the District of Maryland.

(Executive Office)

Teletypes to All United States Attorneys

A listing of recent teletypes sent by the Executive Office is appended to this Bulletin. If a United States Attorney's office has not received one or more of these teletypes, copies may be obtained by contacting the Communications Center, Executive Office for United States Attorneys, at FTS 633-1020.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A petition for certiorari in Yuckert v. Heckler, 774 F.2d 1365 (9th Cir. 1985). The question presented concerns the validity of a regulation promulgated by the Secretary of Health and Human Services to assist decision-makers in determining whether an individual seeking Social Security benefits is disabled.

A protective petition for certiorari in Johnson v. Heckler, 769 F.2d 1202 (7th Cir. 1985). The question presented is the validity of the "severity" regulation at issue in the Yuckert case.

A brief amicus curiae in Atkins v. Rivera, 395 Mass. 189 (1985). The issue is whether an HHS regulation, permitting states which participate in the Medicaid program to use a period up to six months for computing the excess income an applicant must spend on medical care before qualifying for Medicaid, is arbitrary, capricious, or otherwise unlawful.

CIVIL DIVISION

SUPREME COURT HOLDS THAT NEGLIGENT ACTION BY A GOVERNMENTAL OFFICIAL DOES NOT CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE.

These two cases raise the issue of when prisoners can bring actions against state officials for alleged violations of their due process rights. In Daniels, a state prisoner was injured when a jailer negligently left a pillow on a staircase and the prisoner tripped over it. In Davidson, a state prisoner was threatened by another inmate, and he reported the threat to prison authorities. Through negligence, the authorities failed to take action and the prisoner was injured by an attack from the other inmate. In each of these actions, the prisoners brought suits under 42 U.S.C. §1983, contending that their due process rights had been violated. The government participated in Davidson as amicus curiae.

In Daniels, the Court ruled unanimously against the prisoner. The majority held that the due process clause was not meant to protect against injury inflicted by government officials as a result of negligence alone, which was all that the plaintiff-prisoner had alleged. In so holding, the Court overruled its decision in Parratt v. Taylor, 451 U.S. 527 (1981) to the extent that the opinion there indicated that mere negligence would constitute a violation of due process.

In Davidson, the majority applied the result in Daniels and simply held that the prisoner's action could not be sustained because it too was based purely on a claim of negligence. Justice Stevens concurred in the result on the ground that, although there had been a deprivation of a constitutionally protected liberty interest, no due process violation had occurred because the state need not provide a remedy for all such deprivations. Thus, the fact that the prisoner was barred by state sovereign immunity principles from suing the responsible state officials did not necessarily violate due process, although Justice Stevens left open the possibility that it might. Justice Brennan dissented on the ground that he thought the record in Davidson revealed that the prison officials had been reckless in not protecting the threatened inmate. Justices Blackmun and Marshall dissented on the ground that mere negligence does violate the due process clause when a prisoner is prevented by his incarceration from defending himself against attack, and is, therefore, totally dependent on prison officials for his protection.

These decisions should have an enormous impact on future Bivens litigation.

Davidson v. Cannon, ___ U.S. ___, No. 84-6470, Daniels v. Williams, No. 84-5872 (Jan. 21, 1986). D. J. #s 145-0-1700 and 157-79-2422.

Attorneys: Barbara L. Herwig (FTS 633-4525) and Douglas N. Letter (FTS 633-3427), Civil Division.

SUPREME COURT STRIKES DOWN FEDERAL RESERVE BOARD'S ATTEMPT TO REGULATE NONBANK BANKS.

Under the Bank Holding Company Act of 1956, the Federal Reserve Board has broad regulatory authority over any company that has control over any bank. The Act defines a "bank" as an institution that "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." Responding to a proliferation of "nonbank banks," i.e., financial institutions that do not make commercial loans or that offer negotiable order of withdrawal accounts but not traditional checking accounts, the Board amended Regulation Y in 1984 to sweep "nonbank banks" under its regulatory authority. It did this by defining "demand deposits" to include NOW accounts even though the banks have a right to require advance notice prior to withdrawal from a NOW account, thus not giving the depositor a "legal right" to withdraw on demand. It also amended the definition of "commercial loan" to include "any loan other than a loan to an individual for personal, family, household, or charitable purposes." Under this definition the purchase of retail installment loans, commercial paper, money market instruments, certificates of deposits and bankers' acceptances were considered "commercial loans."

Several actions were filed challenging the Board's statutory authority to extend its regulatory powers by redefining statutory terms. The suits were consolidated in the Tenth Circuit, and the court of appeals invalidated both parts of the amended regulation.

The Board's petition for certiorari was granted. The Solicitor General determined that the United States would participate as amicus curiae on behalf of the Department of Treasury and the Office of the Comptroller of the Currency in support of the respondents rather than in support of the Board. The Supreme Court has just affirmed the court of appeals decision, holding that the Board's interpretation of the statutory terms of the definition of "bank" was not a reasonable interpretation. Although the Court acknowledged that it might be consistent with the broad purpose of the Bank Holding Company Act to regulate institutions that are the functional equivalent of banks, the Court held that the Board could not do so "at the expense of the terms of the statute . . . [which] takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."

Board of Governors of the Federal Reserve System v. Dimension Financial Corporation, ____ U.S. ____, No. 84-1274 (Jan. 22, 1986). D. J. # 145-105-337.

Attorneys: John F. Cordes (FTS 633-3380) and Freddi Lipstein (FTS 633-3542), Civil Division.

SUPREME COURT GRANTS CERTIORARI, VACATES COURT OF APPEALS DECISION, AND DIRECTS CASE TO BE TRANSFERRED TO THE FEDERAL CIRCUIT IN CASE WHERE JURISDICTION WAS NOT RAISED IN CERTIORARI PETITION.

Since the early 1950's, the Secretary has used an unwritten standard, the so-called "$50 Rule," to evaluate whether particular local educational agencies (LEAs) are "generally comparable" to a claimant in determining how much Impact Aid the claimant is entitled to for providing a free public education to children whose parents live or work on federal property. If the average local contribution of a selected school district is more than $50 higher than the claimant's contribution (per nonfederally-connected child), they are not considered comparable. In fiscal years 1978 and 1979, the Secretary also used a "grid" to make that evaluation.

Plaintiffs, fifty-five LEA's in California which had filed Impact Aid applications for FY 1979, challenged the validity of the $50 Rule and sought an order requiring the Department's approval of their amended applications. The district court determined that the $50 Rule was invalid because it acted as a cap on benefits where neither the statute nor its legislative history authorized such a cap. The court then ordered the Department to process plaintiffs' amended applications in accordance with the grid alone. The government appealed.

On appeal, the court of appeals ruled that it lacked jurisdiction over 49 of the claims because they all exceeded $10,000 and should have been brought in the Claims Court. With respect to the remaining six claims, it held that the $50 Rule was valid because it was consistent with the language of the statute and the entire scope of the legislative history. The court noted that the entire 30-year history of the law, which included 14 amendments (none of which changed the Secretary's determination of comparability), supported the Secretary's interpretation. The court also ruled that the notice and comment procedures of the APA were not applicable to the $50 Rule. Finally, the court rejected the plaintiffs' estoppel argument, emphasizing that "[t]he Supreme Court has never decided that estoppel may run against the government."

The plaintiffs then filed a petition for certiorari in which they challenged only the Ninth Circuit's determination that the $50 Rule was valid. Even though the plaintiffs did not raise the jurisdictional issue in their petition, the Supreme Court has just granted certiorari, vacated the court of appeals decision, and directed the court of appeals to transfer the case to the Federal Circuit. The Court, thus necessarily, concluded that the jurisdiction of the district court had rested in part on the Little Tucker Act, 28 U.S.C. §1346(a)(2), and that jurisdiction over the appeal lay exclusively in the Federal Circuit under 28 U.S.C. §1295(a)(2).

Chula Vista City School District v. Bell, __U.S.__, No. 85-833 (Jan. 27, 1986). D. J. # 145-16-2094.

Attorneys: Anthony J. Steinmeyer (FTS 633-3388) and Howard S. Scher (FTS 633-4820), Civil Division.

SUPREME COURT DECLINES TO REVIEW FINE OF $2 BILLION LEVIED AGAINST EXXON IN FAVOR OF THE UNITED STATES.

In this case, the Supreme Court denied a petition for certiorari by Exxon Corporation challenging a judgment of nearly $2 billion rendered against it in the district court and sustained by the Temporary Emergency Court of Appeals (TECA). The suit was brought by the United States seeking restitution of overcharges that Exxon caused by violating the oil price provisions of the Energy Policy and Conservation Act. Prior to the passage of that statute, the price of oil had been subject to controls established under other federal legislation. The Energy Policy and Conservation Act lifted these controls, but only with respect to "new oil"--*i.e.*, oil produced from new sources, or from expanded production of existing wells by means, for example, of new production techniques. In this case, Exxon claimed that the oil in issue here was "new oil." The Department of Energy rejected that claim, on the ground that Exxon had simply shut down production on some oil leases, and diverted the potential output on those leases to others under which it had control. The district court finding that Exxon had persisted in this policy, notwithstanding the clear prohibition of Department of Energy Policy, found that the company had caused approximately $2 billion in overcharges. The court ordered the money paid to the states for energy and transportation improvements, since the individual victims of the overcharges could not be established. The TECA affirmed, and the Supreme Court has now denied certiorari. The Court also declined to review objections raised by various oil purchasers and public interest groups which sought a different allocation of the funds payable by Exxon.

Exxon Corp. v. United States, ___ U.S. ___, Nos. 85-429, 85-430, 85-432, 85-440, 85-444 (Jan. 28, 1986). D. J. # 146-18-57-760.

Attorneys: Robert Greenspan (FTS 633-5428) and John C. Hoyle (FTS 633-3547), Civil Division

SUPREME COURT HOLDS THAT VOCATIONAL REHABILITATION AID THAT ENABLES DISABLED RECIPIENT TO ATTEND PRIVATE CHRISTIAN COLLEGE IN ORDER TO PREPARE FOR CHURCH-ORIENTED CAREER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

This case arises from a state agency's denial of financial assistance for vocational rehabilitation to petitioner Witters, who is blind solely because of the vocational path that he had chosen for himself--a church-oriented career. Petitioner challenged this denial in the state administrative bodies and courts as unconstitutional on equal protection and free exercise grounds. The Supreme Court of Washington, however, rejected his challenge and ruled, instead that the denial of financial assistance was required by the Establishment Clause of the First Amendment. The Supreme Court of the United States then granted certiorari, and the government filed an amicus brief supporting the petitioner. The government argued that religiously neutral assistance under a program designed to help a class of disabled persons did not have the effect of impermissibly advancing religion merely because a beneficiary of the program has chosen a church-oriented career. To hold otherwise would cast doubt on the constitutionality of such programs as the federal government's G.I. Bill and Pell Grant programs, which provide financial assistance for education on the basis of military service or financial need, respectively, regardless of the particular nature of the career path chosen by individual beneficiaries.

The Supreme Court has now--in a rare show of unanimity in this area of constitutional law--held that, on the record before it, the provision of financial assistance to petitioner Witters does not offend the establishment clause. (The other issues lurking in the case were not reached, and the case was remanded for further proceedings.) The opinion of the Court, joined in its entirety by all members except Justice O'Connor (who declined to join the discussion in Part II), indicated that a combination of factors surrounding the operation of the state program reveal that the financial aid is for the benefit of the disabled recipient and does not constitute state action sponsoring or subsidizing religion. In addition, five members of the Court indicated (in three concurring opinions) that they would have articulated a broader principle to govern cases of this kind, where religiously neutral programs may result in some indirect benefit to religious organizations. Apparently, however, these Justices chose to refrain from insisting that their views be incorporated in the opinion of the Court, so that an essentially unanimous opinion could be issued.

Witters v. Washington Department of Services for the Blind, ___U.S.___ No. 84-1070 (Jan. 27, 1986). D. J. # 145-0-1663.

Attorneys: Anthony S. Steinmeyer (FTS 633-3388) and Michael Jay Singer (FTS 633-4815), Civil Division.

D.C. CIRCUIT AFFIRM'S DISTRICT COURT DECISION HOLDING ARBITRARY AND CAPRICIOUS NAVY SECRETARY'S DETERMINATION TO REVOKE PREFERENCE FAVORING UNITED STATES FLAG CARRIER UNDER CARGO PREFERENCE ACT OF 1904.

The Cargo Preference Act of 1904 compels the government to ship military cargo by United States flag carriers except where the President determines that the rates charged by United States flag carriers are "excessive or otherwise unreasonable." Here, the Secretary of the Navy, acting as the President's delegate, determined that the rates charged by Rainbow Navigation, the sole United States flag carrier offering service between the United States and Iceland, were excessive and otherwise unreasonable. His determination rested in part upon an economic analysis of the carrier's rates and in part upon foreign policy considerations concerning United States - Iceland relations that were affected by this trade issue. Rainbow obtained an injunction in the district court, which found that the statute prohibited the Secretary from taking non-economic factors into account in making his determination and that the determination on economic grounds was arbitrary and capricious. On appeal, we contended that the determination was committed to agency discretion and thus exempt from judicial review and was not arbitrary and capricious. The D.C. Circuit has affirmed the district court's decision. Judge Scalia's opinion concludes that the freight rate determination under this statute must rest only on economic factors. With respect to those factors, the Court concluded that the statute's "excessive and otherwise unreasonable" standard provided sufficient guidance for meaningful judicial review, especially in light of DOD regulations that interpret the standard to proscribe only rates in excess of those necessary to permit the carrier to make a fair profit.

Rainbow Navigation, Inc. v. Department Of The Navy, ___F.2d___, No. 85-6046 (D.C. Cir. Jan. 27, 1986). D. J. # 145-6-2776.

Attorneys: Leonard Schaitman (FTS 633-3441) and Peter R. Maier (FTS 633-4053), Civil Division.

D.C. CIRCUIT GRANTS PETITION FOR REHEARING EN BANC IN EXEMPTION 10 SUNSHINE ACT.

On October 22, 1985, a panel of the District of Columbia Circuit held that transcripts of agency meetings, closed pursuant to Exemption 10 of the Government in Sunshine Act because they concern the agency's participation in a civil action, must be made public once the subject litigation has ended. Since the panel opinion eviscerates the attorney-client privilege as it applies to the Sunshine Act agencies, the government petitioned for rehearing *en banc*, arguing that the panel's decision is erroneous in two respects. First, it was contrary to the plain language of the statute which permits an agency to deny public access to a record of a meeting which concerns "the agency's participation in a civil action," 5 U.S.C. §552b(c)(10), and makes no provision for release once the litigation is over. Second, it is without basis in the legislative history. Indeed, the Senate Report which the panel principally relied on to hold that the record must be released reported on a bill which did not require an agency to keep *any* record of meetings closed pursuant to Exemption 10. On January 16, 1986, the D.C. Circuit granted the government's petition for rehearing *en banc*.

Clark-Cowlitz Joint Operating Agency v. FERC, ___F.2d___, No. 83-2111 (D.C. Cir. Jan. 17, 1986). D. J. # 145-19-297.

Attorneys: Leonard Schaitman (FTS 633-3441) and Marleigh Dover (FTS 633-4820), Civil Division.

D.C. CIRCUIT ON GOVERNMENT'S SUGGESTION GRANTS REHEARING EN BANC ON QUESTION WHETHER AN AGENCY CAN CHANGE A JUDICIALLY-SUSTAINED STATUTORY INTERPRETATION WITHOUT BEING PRECLUDED BY COLLATERAL ESTOPPEL.

In an October 22, 1985 decision, a panel of the D.C. Circuit held that a prior Eleventh Circuit decision upholding an agency's interpretation of a statute precludes the agency from later adopting the interpretation of its prior opponent. Parties on the agency's side in the prior litigation had initiated this suit seeking to hold the agency to the first interpretation under the doctrine of collateral estoppel. The panel concluded that Federal Energy Regulatory Commission (FERC) had no right to defend its current interpretation of the Federal Power Act's "municipal preference" provision after its earlier and contrary interpretation had been upheld by the Eleventh Circuit in litigation involving the same parties and intervenors. The panel's ruling appeared to be incorrect as a matter of both preclusion and administrative law. It also had serious implications respecting agency power to revise or correct statutory interpretations which have been sustained in prior industry-wide litigation. The Solicitor General, therefore, authorized the United States, on behalf of all government agencies, to file an amicus brief urging the D.C. Circuit to grant FERC's petition for rehearing en banc and to reconsider this aspect of the panel decision. The court of appeals, on January 16, 1986, granted rehearing en banc, vacated the panel decision, and will issue a further order governing the en banc proceedings.

Clark-Cowlitz Joint Operating Agency v. FERC, __ F.2d ___, No. 83-2231 (D.C. Cir. Jan. 16, 1986). D. J. # 145-19-474.

Attorneys: Leonard Schaitman (FTS 633-3441) and Michael Kimmel (FTS 633-5714), Civil Division.

D.C. CIRCUIT AFFIRMS DISTRICT COURT JUDGMENT THAT CASH TRANSFERS TO ISRAEL DO NOT TRIGGER THE PROVISIONS OF THE CARGO PREFERENCE ACT.

Congress gives non-military aid to Israel in the form of cash transfers--annual deposits of funds in an Israeli bank account. Aside from the requirement that the money not be spent on military purchases, the United States places no restrictions on how the money is used, and no documentation regarding how the money actually was spent is required. Congress has, however, instructed the President that, in exercising his authority under the cash transfer program, he shall ensure that the level of cash transfers "does not cause an adverse impact on the total amount of non-military exports from the United States to Israel." American shipping interests argued that this language regarding "adverse impact" triggered the Cargo Preference Act, 46 U.S.C. §1241(b)(1), which requires, inter alia, that whenever the United States advances funds or credits in connection with the furnishing to a foreign nation of equipment, materials or commodities, 50 percent of the goods have to be shipped on United States flag commercial vessels. The State Department's Agency for International Development (AID) took the position that the Cargo Preference Act did not apply to pure transfers of cash, since the cash could be spent in virtually any way, and there was no requirement that actual purchases be documented.

The district court agreed with the AID interpretation, and an appeal was taken by the shipping interests. Three days after oral argument, the court of appeals affirmed, adopting the district court's (and AID's) reasoning that unrestricted cash transfers do not trigger the Cargo Preference Act.

Council Of American Flag Ship Operators v. United States, ___F.2d___, No. 84-5850 (D. C. Cir. Jan. 15, 1986). D. J. # 145-2-427.

Attorneys: John F. Cordes (FTS 633-3380) and Richard A. Olderman (FTS 633-4053), Civil Division.

THIRD CIRCUIT AFFIRMS STRICT LIABILITY OF STATES FOR UNAUTHORIZED ISSUANCES OF FOOD STAMPS BUT DENIES UNITED STATES INTEREST ON THE AMOUNT DUE.

The Department of Agriculture sought to recover from the Commonwealth of Pennsylvania several hundred thousand dollars that represented the dollar value of food stamps the Commonwealth issued on expired, duplicate, out of state or other invalid participation cards. The Commonwealth claimed that the government could not recover these amounts without showing actual financial loss resulting from the unauthorized issuances. The government also sought to recover interest on the debts created by the unauthorized issuances.

The Commonwealth sued in district court claiming that the Food Stamp Act permits recoupment only where there has been an actual financial loss even if food stamps are issued on invalid participation cards. It also claimed that the government had no right to recover interest against the state. The district court held that the Food Stamp Act authorizes a presumption of loss and that individualized determinations in every case of an unauthorized issuance would unduly burden the program. The court held, however, that the United States could not recover interest because the Debt Collection Act of 1982, in particular 31 U.S.C. §3717, has abrogated the common law right to recover interest against states and there is no explicit provision in the Food Stamp Act to provide for interest.

The Commonwealth appealed the strict liability ruling and the government cross-appealed on the interest question. The Third Circuit affirmed the district court's decision on both points, finding that a presumption of financial loss is warranted by the Food Stamp Act and minimizes administrative costs of the program thus maximizing benefits. The court of appeals agreed with the district court, however, that in the absence of a specific statutory provision authorizing interest, the Debt Collection Act has abrogated the common law right to recoup interest against states. In reaching this conclusion, the court adopted the decision of the Second Circuit in Perales v. United States, 751 F.2d 95 (2d Cir. 1984).

Commonwealth Of Pennsylvania v. United States, ____F.2d____, Nos. 85-5186 and 85-5269 (3d Cir. Jan. 6, 1986). D. J. # 147-63-18.

Attorneys: William Kanter (FTS 633-1597) and Freddi Lipstein (FTS 633-3542), Civil Division.

SIXTH CIRCUIT HOLDS THAT REQUIRED RECORDS EXCEPTION TO THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION APPLIES TO ODOMETER STATEMENTS, AND THAT AN AUTO DEALER MUST PRODUCE SUCH RECORDS TO A GRAND JURY.

By federal law, automobile dealers are required to keep odometer statements and make them available to agents of the Secretary of Transportation for inspection. These statements must be provided by all persons selling cars, and indicate whether the seller knows that the mileage on the odometer is accurate. In these consolidated cases, two grand juries in Kentucky (which, with Tennessee, is the odometer tampering capital of the United States) were investigating instances of suspected odometer tampering, which is a federal crime. Two used car dealers were summoned to appear before the grand juries and to bring with them odometer statements covering specified years. The dealers claimed that, under the Fifth Amendment's protection against self-incrimination, they did not have to produce their odometer records. (The government had information that one of the dealers had not kept the statements, which is itself a federal crime.) They asked the respective district courts supervising the grand juries to quash the subpoenas. Both district courts held that the statements themselves were covered by the required records exception to the Fifth Amendment. This exception covers certain types of documents required to be kept by law if needed for a legitimate regulatory purpose. However, the district courts held that the act of producing the documents could be incriminatory, and could not therefore be compelled. We appealed arguing that the required records exception applies to both the contents of the record and to their production; hence, holders of such records could not decline to produce them for a grand jury even if doing so might tend to incriminate them. The Sixth Circuit has now accepted our contention, holding that the required records exception is an exception to the privilege against self-incrimination and applies even though production of the documents could lead to evidence that would be used against the holder of the documents. This is the first court of appeals to have ruled on this issue since the Supreme Court held that the Fifth Amendment can protect against compelled production of documents even if the contents of those documents are not protected, United States v. Doe, 104 S. Ct. 1237 (1984), and we expect other cases presenting this issue to arise.

In Re Grand Jury Subpoena Served Upon Randall Underhill And In Re Grand Jury Proceedings, Ward Massey, ___ F.2d ___, Nos. 85-5127 and 85-5134 (6th Cir. Jan. 13, 1986). D. J. #s 183-31-5, 183-30-2.

Attorneys: Leonard Schaitman (FTS 633-3441) and Douglas N. Letter (FTS 633-3427), Civil Division.

SEVENTH CIRCUIT EN BANC HOLDS THAT THE FBI DID NOT DEPRIVE A JOB APPLICANT OF A LIBERTY INTEREST BY TRANSMITTING AN INVESTIGATORY FILE--WHICH CONTAINED DISPARAGING INFORMATION ABOUT THE APPLICANT--TO PROSPECTIVE FEDERAL GOVERNMENT EMPLOYERS.

Plaintiff Perry applied for a position as law enforcement officer with the Bureau of Alcohol, Tobacco and Firearms (BATF). The BATF expressed interest, but after reading an investigatory file compiled by the FBI, it rescinded its offer of employment. The file contained reports from third parties, including local law enforcement officers, that Perry on several occasions had impersonated federal officials and engaged in other questionable conduct. Perry brought suit against the FBI, alleging that dissemination of the information deprived him of liberty without due process. A divided panel of the court of appeals agreed, reasoning that because the FBI file stigmatized plaintiff and as a practical matter foreclosed future job opportunities in the government, the FBI had deprived plaintiff of a liberty interest under the Fifth Amendment. Accordingly, it remanded the case with instructions to determine what process was due in the circumstances.

The en banc court has just reversed, holding that the FBI's transmittal of the file was consistent with the Fifth Amendment. The court (7-2) first stated that a failure to hire in these circumstances did not implicate a liberty interest. While the majority acknowledged that plaintiff's future job prospects might be impaired, it suggested that only a legal foreclosure of job opportunities could constitute the deprivation of a liberty interest. Second, the court held that even if the liberty interest claim were cognizable, Perry had received all the process that was due--namely, he had been given the opportunity to rebut the charges in writing, and his rebuttal had been placed in the FBI file.

Perry v. FBI, ___F.2d___, No. 82-1136 (9th Cir. Jan. 23, 1986). D. J. # 145-12-3435.

Attorneys: Harold Krent (FTS 633-3159), Civil Division.

EN BANC ELEVENTH CIRCUIT HOLDS THAT FERES DOCTRINE DOES NOT BAR ACTION ON BEHALF OF SERVICEMAN ALLEGING NEGLIGENCE OF ONLY CIVILIAN EMPLOYEES OF THE GOVERNMENT.

Horton Johnson, a helicopter pilot for the Coast Guard, was killed when his helicopter crashed during a rescue mission on the high seas. Plaintiff, Johnson's wife and the administrator of his estate, brought this action under the Federal Tort Claims Act alleging that FAA air traffic controllers were negligent in guiding Johnson's helicopter. The district court dismissed the complaint on the basis that the injury was incident to Johnson's military service and thus barred by Feres v. United States, 340 U.S. 135 (1950). A panel of the Eleventh Circuit reversed. The panel reasoned that the primary basis for the Feres doctrine was the potential for disruption of military discipline, and that this concern is inapplicable when the serviceman sues civilian employees of the government rather than fellow servicemen. The Eleventh Circuit granted our suggestion for rehearing en banc but has now issued a short per curiam opinion reinstating the panel opinion. The government is considering whether to seek certiorari.

Johnson v. United States, ___F.2d___, No. 83-5764 (11th Cir. Jan. 13, 1986). D. J. # 157-18-1891.

Attorneys: Robert S. Greenspan (FTS 633-5428) and Nicholas S. Zeppos (FTS 633-5431), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

CONDEMNATION: VALUATION OF UNIMPROVED LAND REQUIRES EVIDENCE OF COMPARABLE SALES OF UNIMPROVED PROPERTY AT TIME OF TAKING.

In a published opinion, the Fourth Circuit reversed and remanded this condemnation award case to the Eastern District of Virginia, finding that the district court committed error both when it determined (1) on motions *in limine* that the landowners were entitled to the value of the condemned property as improved by WMATA rather than the unimproved value, and (2) attempted to predetermine the outcome of a reversal on the first issue by subtracting the value of the improvements from the value of the land improved in order to establish the unimproved value.

The Fourth Circuit reversed the district court both in awarding the improved value of the property, and in the method used to predetermine the outcome of a reversal. The ccurt stated that the right of entry agreement could not be construed as contemplating a rent on the property in the form of WMATA's improvements, and that under condemnation law the condemnee is entitled only to the unimproved value at the date of taking. The court furthermore stated that the proper method for determining the unimproved value requires evidence of comparable sales of unimproved parcels at the time of the taking, and that it was improper for the district court to attempt to determine that amount by subtracting the specific value of one improvement from the improved value of the property. The court also stated that it rejected WMATA's contention that the property should be valued as of the date of the right of entry, although WMATA made no such contention. The case was remanded for determination of the unimproved value at the date of taking.

WMATA v. One Parcel of Land in Fairfax County, VA, ___F.2d___, No. 85-1200 (4th Cir. Jan. 2, 1986). D. J. # 33-48-818-102.

Attorneys: William B. Lazarus (FTS 633-4168) and Martin W. Matzen (FTS 633-4426), Land and Natural Resources Division.

INDIAN TRIBES RESCISSION OF ITS APPROVAL OF A PROPOSED MINERALS AGREEMENT SUSTAINED.

The Indian Mineral Development Act of 1982 ("IMDA"), 96 Stat. 1938, 25 U.S.C. §2101 *et seq.*, authorizes Indian tribes and individual restricted Indians to enter into joint ventures and other "minerals agreements" providing for the exploration and development of Indian-owned mineral resources. The IMDA further provides, however, that any such minerals agreements must be approved by the Secretary of the Interior.

Pursuant to the IMDA, the Blackfeet Tribe and Quantum Exploration Co. agreed upon and signed a proposed minerals agreement giving Quantum the right to explore for, and develop, oil and gas resources on the Blackfeet Reservation. The proposed agreement was then submitted by the Tribe and Quantum to the Secretary for his approval or disapproval. Before the Secretary acted on the proposal, however, the Tribe, acting in part upon advice given by the Bureau of Indian Affairs ("BIA"), enacted a tribal resolution rescinding its prior approval of the proposed agreement. The Secretary, therefore, took no action upon the proposal.

Quantum then filed an action in the district court seeking an order directing the Secretary to act upon the proposal. The district court, however, dismissed the action and Quantum appealed.

The court of appeals affirmed. The court held that, as statutory language requiring governmental approval of Indian agreements traditionally means that such agreements are wholly invalid absent the requisite governmental approval, the Tribe remained free to withdraw its assent to the proposal at any time prior to Secretarial approval. Consequently, as the Tribe had validly rescinded its approval to the proposal, there was no longer any agreement in being upon which the Secretary could act--the Tribe, by its rescission had withdrawn the proposal. The court also held that the BIA was free to advise the Tribe concerning the proposed mineral agreement.

Quantum Exploration, Inc. v. Hodel, ___F.2d___, No. 84-4406 (9th Cir. Jan. 21, 1986). D. J. # 90-6-8-41.

Attorneys: Robert L. Klarquist (FTS 633-2731) and Jacques B. Gelin (FTS 633-2762), Land and Natural Resources Division.

CHEROKEE NATION NOT PRECLUDED BY ALLEGING A TAKING OF ITS INTERESTS IN BED OF NAVIGABLE RIVER BY CONSTRUCTION OF NAVIGATION PROJECT.

The Cherokee Nation owns parts of the bed of the Arkansas River, a navigable stream. Pursuant to congressional authorization under the Commerce Clause, the United States constructed the McClellan-Kerr Navigation Project on the Arkansas River. The Tribe filed suit alleging a Fifth Amendment taking, seeking just compensation for past and future loss of mineral deposits, fair market value of dam sites, and other damage to the bed and banks of the Arkansas River. The district court granted summary judgment in favor of the Tribe holding that the United States, having granted fee simple title to the banks and bed of the Arkansas River with no reservation of a navigational servitude, is liable for a taking of private property and must pay just compensation. The court of appeals affirmed on different grounds. By a 2-1 vote, it held that although the United States has the power under the Commerce Clause to exercise its navigational servitude over that river, its right is limited by the "unique circumstances" of Cherokee history, the terms of the treaty patent, and the government's fiduciary duty, which preclude exempting the federal government from liability for damage to the tribe's property interests.

Cherokee Nation of Oklahoma v. United States, ___F.2d___, No. 84-2355 (10th Cir. Jan. 23, 1986). D. J. # 90-2-4-949.

Attorneys: Jeffrey P. Minear (FTS 633-3957), Office of the Solicitor General; Jacques B. Gelin (FTS 633-2762), Land and Natural Resources Division.

UNITED STATES ATTORNEYS' OFFICES

MIDDLE DISTRICT OF GEORGIA

DISTRICT COURT HOLDS THAT A TORT ACTION ALLEGING THE NEGLIGENT DESIGN AND CREATION OF MILITARY SPECIFICATIONS FOR EXPLOSIVES IS BARRED BY THE DISCRETIONARY FUNCTION EXCEPTION.

An explosion took place in a pyrotechnic plant in Byron, Georgia, resulting in the death of one employee and serious injury to another. At the time of the explosion, the employees were screening and packaging a powder mixture for a California-based corporation for use in that corporation's contract with the United States Navy for the manufacture of "impulse cartridges." Plaintiffs contended that the United States had negligently designed and created military specifications for explosives, posing an unreasonable risk of harm to those following the specifications in manufacture. Plaintiffs also contended that the government and the contractor failed to give adequate warnings, failed to give adequate instructions on safe handling, and failed to make safety inspections regarding the powders forming the explosives.

The United States filed a motion to dismiss based on the discretionary function exception to the FTCA. The district court granted the motion, finding that the design and creation of military specifications for explosives are "of vital importance to the success of the Department of the Navy's and hence the government's program which is 'to provide for the common defense.'" The court stated that "it is difficult to conceive of a more momentous governmental function." Finally, the court was persuaded that the design and creation of specifications "is perforce a planning as opposed to an operational activity." Therefore, the court held that the case fell within the discretionary function exception.

The court went on to alternatively hold that the plaintiffs had not established any affirmative acts or omissions on the part of the United States giving rise to an actionable duty under Georgia law. The government contractor was granted summary judgment based upon the statutory employer doctrine.

Maynard v. United States, ___F. Supp.___, Nos. 81-304-MAC and 81-305-MAC (M.D. Ga. Jan. 15, 1986). D. J. #s 157-19M-411 and 157-19M-412.

Attorney: Frank L. BUTLER, III (FTS 238-0454), Assistant United States Attorney, Middle District of Georgia.

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TELETYPES TO ALL UNITED STATES ATTORNEYS

02-05 & 06-86	From William P. Tyson, Director, by Jason P. Green, Director, Office of Legal Services, re: "Unauthorized Survey of United States Attorneys."
02-06-86	From William P. Tyson, Director, by Jason P. Green, Director, Office of Legal Services, re: "Spanish Translation--Victim-Witness Handbook and Preparing to Testify Pamphlet."
02-06-86	From William P. Tyson, Director, by Laurence S. McWhorter, Deputy Director, re: "United States Attorneys' Drug Education Conference, March 3-5, 1986, Clearwater, Florida."
02-10-86	From Richard L. DeHaan, Director, Office of Administration and Review, re: "Employment Control Procedures."
02-10-86	From William P. Tyson, Director, re: "Larry D. Thompson, United States Attorney, Northern District of Georgia."

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William P. Tyson, Director

Editor-in-Chief: Jason P. Green FTS 633-4024
Editor: Judith C. Campbell FTS 673-6348

TABLE OF CONTENTS

Page

COMMENDATIONS 121

POINTS TO REMEMBER
  Legal/Policy Advisory on Asset Forfeiture Matters 121
  Request for Notice of Separation of Power Cases 122
  United States Attorneys' Bulletin 122

CASENOTES
  OFFICE OF THE SOLICITOR GENERAL 122
  CIVIL DIVISION 123
  CIVIL RIGHTS DIVISION 127
  LAND AND NATURAL RESOURCES DIVISION 128
  UNITED STATES ATTORNEYS' OFFICES 129

APPENDIX
  Cumulative List of Changing Federal Civil Postjudgment Interest Rates .. 130
  United States Attorneys' List 131

VOL. 34, NO. 5 THIRTY-THIRD YEAR MARCH 15, 1986

Please send change of address to Editor, United States Attorneys' Bulletin, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

COMMENDATIONS

The following Assistant United States Attorneys have been commended:

LYNDIA P. BARRETT and KEVIN M. MOORE (Florida, Northern), by Mr. Richard P. Kusserow, Inspector General, Health and Human Services, for their successful prosecution of a medicaid fraud case.

WILLIAM F. FAHEY (California, Central), by Mr. Richard T. Bretzing, Special Agent-in-Charge, Federal Bureau of Investigation, for his successful prosecution of a bank robbery case.

DARRELL W. MACINTYRE (California, Central), by Mr. Diogenes K. Galanos, Special Agent-in-Charge, Drug Enforcement Administration, for his successful prosecution of a cocaine trafficker.

ROBERT A. MANDEL (South Dakota), by Mr. James R. Molash, Agency Special Officer, Bureau of Indian Affairs, Department of the Interior, for his successful prosecution of a manslaughter case.

JOEL V. MERKEL (Illinois, Southern), by Deputy Attorney General D. Lowell Jensen for his recent accomplishments in the prosecution of fish and wildlife offenses.

STEPHEN P. PREISSER and KENNETH W. SUKHIA (Florida, Northern), by Attorney General Edwin Meese III for their outstanding advocacy and professionalism in the prosecution of United States v. Horne.

ERIC WILLIAM RUSCHKY (South Carolina), by Mr. R.M. Hazelwood III, Inspector-in-Charge, United States Postal Service, for his successful prosecution of a postal clerk for theft of United States Treasury checks.

PAUL L. SEAVE and NANCY W. STOCK (California, Central), by Mr. Robert Skopeck, Special Agent-in-Charge, Bureau of Alcohol, Tobacco, and Firearms, for their successful prosecution of an arson-insurance fraud case.

POINTS TO REMEMBER

Legal/Policy Advisory on Asset Forfeiture Matters

The Asset Forfeiture Office of the Criminal Division prepares advisories on numerous legal/policy issues each month in the course of their regular duties.

A copy of the following advisory may be obtained by contacting the Office of Legal Services, Executive Office for United States Attorneys, at FTS 633-4024:

Opinion Number L86-1 - United States v. vonNeumann in which the Supreme Court reversed the Ninth Circuit opinion which held that a 36-day delay in responding to a petition for administrative remission of forfeiture deprived the respondent due process of law in violation of the Fifth Amendment.

Please ask for item number CH-29.

(Executive Office)

Request for Notice of Separation of Power Cases

The Civil Division is currently engaged in litigation concerning the constitutionality of the exercise of law enforcement powers by independent administrative agencies whose heads are not subject to removal at will by the President. To coordinate the Executive Branch's position on this issue, it is important that the Civil Division be advised of all cases where the exercise of law enforcement authority by administrative agencies is challenged as a violation of the separation of powers.

Because this issue may arise in cases which do not routinely come to the attention of the Civil Division, please notify Brook Hedge (633-3501) or Thomas Millet (633-3428) of any cases in United States Attorneys' offices which raise this issue.

(Civil Division)

United States Attorneys' Bulletin

Beginning with this issue, the Bulletin will now be published monthly--on the 15th of each month. This action is a Gramm-Rudman-Hollings cost savings measure that is being made to reduce the Bulletin's publication costs.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A brief amicus curiae in University of Tennessee v. Elliott, 766 F.2d 982 (6th Cir. 1985). The question presented is whether a federal court adjudicating a Title VII action should give preclusive effect to a decision of a state administrative agency previously rejecting the claim of employment discrimination.

A petition for certiorari in United States v. General Dynamics Corp., 773 F.2d 1224 (Fed. Cir. 1985). The question is whether a taxpayer using the accrual method of accounting may deduct an addition to a reserve for future expenses expected to be paid under an employee medical plan, where the addition is based on an erroneous estimate by the taxpayer of its liability to employees during the year.

CIVIL DIVISION

D.C. CIRCUIT STRICTLY APPLIES RULE 77(D) IN DISMISSING AN APPEAL AS UNTIMELY DESPITE CLERK'S FAILURE TO GIVE NOTICE TO COUNSEL.

In this case, the D.C. Circuit dismissed an appeal as untimely, holding that the clerk's failure to send a notice of an adverse judgment in time for counsel to file a notice of an appeal under Rule 4(a)(1), Federal Rules of Appellate Procedure, or seek a 30-day extension from the district court under Rule 4(a)(5), Federal Rules of Appellate Procedure, was insufficient as a matter of law to justify relief from the judgment under Rule 60(b), Federal Rules of Civil Procedure. In rejecting the appeal as untimely, the court ruled that Rule 77(d) of the Federal Rules of Civil Procedure, amended after the Supreme Court's decision in Hill v. Hawes, 320 U.S. 520 (1944), expressly precluded any reliance on a failure of the clerk to give notice as an excuse for failing to notice an appeal or request an extension to file such notice. The court reasoned that Rule 77(d) created an implied duty of diligence on the part of counsel to become aware of any decision of the district court. The court also narrowly construed its prior decision in Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, 500 F.2d 808 (D.C. Cir. 1974), which had held that Rule 60(b) could be used to circumvent Rule 77(d) in specific circumstances, suggesting that the case was wrongly decided and might well be overruled in an appropriate case. In a concurring opinion, Judge Edwards emphasized that Expeditions Unlimited was wrongly decided and that, in the future, "no attorney would be well advised to rely on Expeditions Unlimited to justify an untimely appeal."

Although this case did not involve government counsel, the case emphasizes the importance of vigilance in staying abreast of the district court docket sheet and makes clear that Rule 77(d) will be strictly enforced in the D.C. Circuit.

Ashby Enterprises, LTD v. Weitzman, Dmy & Associates, ___F.2d___, No. 85-5010 (D.C. Cir. Jan. 14, 1986).

D.C. CIRCUIT RULES THAT DEPARTMENT OF LABOR'S DECISION NOT TO INSTITUTE ENFORCEMENT ACTIONS IS UNREVIEWABLE, BUT REMANDS CASE FOR DISTRICT COURT TO CONSIDER WHETHER SECRETARY'S ANNOUNCED STATUTORY INTERPRETATION IS ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW.

This case involves the Labor Department's enforcement of certain reporting provisions of the Labor-Management Reporting and Disclosure Act. Plaintiff union sought to require the Secretary to bring an action against Kawasaki Motor Corp. for failure to comply with these reporting requirements. Plaintiff also attacked the Secretary's general enforcement policies, which they claimed unfairly enforced these reporting provisions against unions, but not against employers. The district court dismissed all of plaintiff's claims.

The D.C. Circuit has now upheld the government's position that Heckler v. Chaney, precludes judicial review of the Secretary's enforcement decisions, including his overall enforcement policies. However, the panel remanded the case back to the district court to consider whether certain statements, which were made by the Secretary in his statement of reasons for not bringing an action against Kawasaki and which, in the panel's view, constituted announcements of statutory interpretation, are arbitrary, capricious, or not in accordance with law. Government counsel are currently consulting with the Department of Labor to determine whether to recommend seeking further review of the panel's remand order.

International Union, UAW v. Brock, ___ F.2d ___, Nos. 84-5051, 84-5864 (D.C. Cir. Feb. 11, 1986). D. J. # 145-10-1904.

Attorneys: Robert S. Greenspan (FTS 633-5428) and John C. Hoyle (FTS 633-3547), Civil Division.

SECOND CIRCUIT AFFIRMS DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT DISMISSING CLASS ACTION SUIT CHALLENGING ARMY AND AIR FORCE REGULATIONS WHICH EXCLUDE SINGLE PARENTS FROM ENLISTMENT.

In a per curiam opinion issued by a panel of the Second Circuit, the court of appeals affirmed the district court's grant of summary judgment in favor of the Army and Air Force in a class action challenging military regulations that prevented single parents from enlisting in the regular or reserve forces. The plaintiffs were a class of single mothers with custody of children under eighteen years of age, who were denied enlistment in the services unless they relinquished custody of their children. Plaintiffs challenged the military regulation on numerous constitutional grounds, alleging that the enlistment policies unjustifiably discriminated against unmarried parents, penalized fundamental rights in the area of marriage and family life, discriminated against women, and erected an irrebuttable presumption as to the fitness of single parents for military service. The district court held that the military regulations were subject to judicial review, but ruled that the military had to show only that the challenged regulations were reasonably relevant and necessary to the furtherance of national defense. On the basis of the record, the court found that the military had established that the enlistment of single parents could have a deleterious effect on military readiness, deployment, and mobility.

Mack v. Rumsfeld, ___F.2d___, No. 85-6184 (2d Cir. Jan. 29, 1986). D. J. # 145-15-874.

Attorneys: John Cordes (FTS 633-3380) and Linda Silberman (FTS 633-1673), Civil Division.

SIXTH CIRCUIT APPLIES $75 CAP TO A CASE ARISING UNDER THE NEW EAJA AND HOLDS THAT POST-JUDGMENT INTEREST ON A RECOVERY UNDER THE SOCIAL SECURITY ACT IS BARRED BY SOVEREIGN IMMUNITY.

The new Equal Access To Justice Act (EAJA), Pub. L. No. 99-80, 99 Stat. 186 (1985), retained the $75 per hour limitation on fees awarded under the Act which had been imposed under the original EAJA passed in 1980. 28 U.S.C. §2412(d)(2)(A). Both the original EAJA and the new EAJA provided that this cap may be increased to take into account "an increase in the cost of living" or other "special factors." In this case, the Sixth Circuit acknowledged that the cost of living had increased since 1980 but held that Congress' readoption of the same cap under the new EAJA justified the district court's refusal to award more than the cap in a case arising under the new EAJA. This holding appears to be inconsistent with dicta appearing in a recent decision of the D.C. Circuit in Hirschey v. Federal Energy Regulatory Commission, 777 F.2d 1 (D.C. Cir. 1985), where the court allowed a cost of living increase from the date of enactment of the original EAJA. The court also held that the district court had not abused its discretion in holding that other special factors, such as the alleged unavailability of attorneys, did not justify a higher hourly rate.

The Sixth Circuit also affirmed the district court's refusal to award post-judgment interest on the award of past-due disability benefits under the Social Security Act. The court held that the disability program did not constitute a "business venture" sufficient to overcome the general rule that the United States is not liable for interest. The court acknowledged that, under Sixth Circuit precedent, this general rule was subject to the exception that interest may be assessed where "the United States embarks on a business venture." The court reasoned, however, that the mandatory nature of the program, the non-self-supporting nature of the program and the absence of standard form insurance contracts under the program, made the program "more in the nature of a traditional governmental function as opposed to a business venture."

Chipman v. Secretary of Health and Human Services, ___F.2d___, No. 85-5575 (6th Cir. Jan. 16, 1986).

Attorneys: Alice Howze (Assistant U.S. Attorney, Tennessee, Western) FTS 222-4231.

NINTH CIRCUIT HOLDS THAT AN EMPLOYER'S DUTY TO ACCOMMODATE ITS EMPLOYEES RELIGIOUS BELIEFS IS SATISFIED BY THE EMPLOYER'S OFFER OF A REASONABLE ACCOMMODATION, EVEN IF THE EMPLOYEE PREFERS A DIFFERENT ARRANGEMENT.

This case involves the extent of an employer's duty under Title VII to accommodate its employees religious beliefs. Two postal window clerks, who are opposed 'to the draft on religious grounds, challenged the Postal Service's decision to require its window clerks to handle draft registration materials. The employees requested that they be permitted to refer all queries concerning registration to other postal windows. The Postal Service refused, and instead offered to facilitate the employees' transfer to a different position within the Postal Service which did not involve draft registration duties. The district court concluded that the Postal Service's actions violated Title VII's prohibition against religious discrimination in the workplace. In the court's view, an employer must accept an employee's suggested accommodation--in this case referring customers to other windows--unless the employer can demonstrate that such action would have created an undue burden on Postal Service operations (which the Postal Service did not do in this case).

The court of appeals has reversed, agreeing with us that an employer's duty under Title VII does not extend beyond offering a "reasonable" proposal that would satisfactorily accommodate its employees' religious beliefs. In other words, if the accommodation suggested by the employer is objectively "reasonable," the employer need not accept its employee's counterproposal, even if the employee's proposal is also reasonable. The court's decision recognizes that while Title VII protects employees from job related requirements that impinge on their religious beliefs, it does not authorize employees to pick and choose among various job options for secular reasons (and thereby infringe legitimate employer prerogatives). Accordingly, the court remanded the case for the district court to determine whether the Postal Service's transfer option did in fact constitute a "reasonable" accommodation. A similar Title VII issue is currently pending in the Supreme Court (School Board of Ansonia v. Philbrook).

American Postal Workers Union v. Postmaster General, ____F.2d____, No. 84-2388 (9th Cir. Jan. 31, 1986). D. J. # 35-11-380.

Attorneys: John Cordes (FTS 633-3180) and Harold J. Krent (FTS 633-3159), Civil Division.

ELEVENTH CIRCUIT UPHOLDS CONSTITUTIONALITY OF STATUTORY FREEZE IMPOSED ON RATES THAT DOCTORS CAN CHARGE MEDICARE RECIPIENTS.

In 1984, as part of the Deficit Reduction Act, Congress decided to freeze for 15 months Medicare reimbursement rates (the amounts that Medicare recipients would receive as reimbursement for amounts paid for medical services). Doctors were given a choice of being participating or non-participating physicians. The latter could treat Medicare patients, but would receive payment from the patient directly, and the patient would then seek reimbursement from the government. Congress was worried that by freezing only the reimbursement rates, it would place on Medicare recipients alone the burden of this budget deficit reduction measure because physicians would raise their fees and the Medicare patients would have to make up out of their own funds the increased difference between the new higher charge and the frozen amount that the Medicare program would reimburse. (This was not a concern for patients of participating physicians who would receive payment directly from Medicare, and, therefore, would not be able to attempt to extract a higher fee from the patient.) Therefore, Congress concomitantly froze the amount that non-participating doctors could charge Medicare patients. Two doctors brought suit challenging this statute on a variety of constitutional grounds.

The district court upheld the validity of the statute, and the court of appeals has now affirmed that ruling. The Eleventh Circuit held that the statute was rationally related to a permissible legislative goal even though it did not contain a mechanism to ensure that all covered doctors can obtain a reasonable profit during the freeze. The court also held that the statute did not constitute a prohibited taking, did not infringe the liberty of contract rights, and was not a bill of attainder. Other doctors have sued challenging this statute elsewhere. This decision should help defeat those suits, and thereby protect Medicare patients from bearing alone the burden of reducing the cost of the Medicare program which also benefits doctors significantly.

Whitney v. Heckler, ___F.2d___, No. 85-8129 (11th Cir. Jan. 22, 1986). D. J. # 137-19-558.

Attorneys: Anthony J. Steinmeyer (FTS 633-3380) and Douglas N. Letter, FTS (633-3427), Civil Division.

CIVIL RIGHTS DIVISION

FOURTH CIRCUIT UPHOLDS PLAN TO END BUSING OF ELEMENTARY STUDENTS.

Adopting the arguments made in the government's amicus curiae brief, a three-judge appeals court panel upheld the constitutionality of the decision of the Norfolk, Virginia, School Board to abandon its busing of elementary school students in favor of neighborhood school assignments. The court held that because Norfolk had eliminated all vestiges of its dual system, it was free to eliminate busing unless its decision was motivated by discriminatory intent. Applying this standard, the court concluded that the Board's decision was prompted by a desire to retain parental support and students, not by discriminatory intent.

Riddick v. School Board of the City of Norfolk, ___F.2d___, No. 84-1815 (4th Cir. Feb. 6, 1986). D. J. # 169-79-4.

Attorney: Irving Gornstein (FTS 633-4491), Civil Rights Division.

LAND AND NATURAL RESOURCES DIVISION

BANKRUPTCY CODE RESTRICTS TRUSTEE'S ABILITY TO ABANDON TOXIC WASTE SITE.

The case explores the interaction between liability arising from possession of a toxic waste site and relief from liability afforded by the 1978 Bankruptcy Code. In the face of state agency directives that Quanta Resources Corporation clean up its waste sites, Quanta filed a bankruptcy petition. The bankruptcy proceeding eventually entailed liquidation of Quanta's assets under Chapter 7 of the Code, and a trustee in bankruptcy was appointed. The trustee sought leave of the bankruptcy court, pursuant to 11 U.S.C. §554(a), to abandon the Bankrupt's two sites in New York and New Jersey. The Supreme Court held that Congress, in enacting the 554(a) abandonment provision, intended to adopt pre-Code court decisions holding that public health and safety laws served to qualify and restrict the trustees power to abandon bankrupt assets. The Supreme Court specifically held that Section 554(a) of the 1978 Bankruptcy Code did not preempt "all" state and local laws, and that bankruptcy courts do "not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety." The court remanded, leaving to the courts below to decide which state laws to apply, and how they would be applied to the abandonment proposed.

Midlantic Nat. Bank v. N.J. Dept. of E.P., ___ U.S. ___, Nos. 84-801, 84-805 (Jan. 27, 1986). D. J. # 90-11-2-54.

Attorneys: Jeffrey P. Minear (FTS 633-3957), Assistant to the Solicitor General and Dirk D. Snel (FTS 633-4400), Land and Natural Resources Division.

SECRETARY OF THE INTERIOR NOT PRECLUDED FROM ESTABLISHING MARKET VALUE FOR ROYALTY TO INDIANS IN EXCESS OF STATE PRICING ACT.

Sitting en banc, the majority adopted the prior dissenting opinion of Judge Seymour as the opinion of the court. The Jicarilla Apache Tribe sued both a number of oil companies that had leases on the reservation as well as the Secretary of the Interior. The district court held that all lessees must calculate the value of the natural gas produced using two different accounting methods, with the higher value to be used to determine royalties owed the Tribe. The district court further held that the Secretary had breached a fiduciary duty in not requiring dual accounting. Finally, the district court held that price ceilings under the New Mexico Natural Gas Pricing Act did not apply to the Jicarilla Reservation.

On appeal, the Tenth Circuit set aside the district court's holdings. Judge Seymour dissented, arguing that the regulations dealing with oil and gas on tribal lands spelled out specific duties which the Secretary had breached. Judge Seymour also concluded that the New Mexico Natural Gas Pricing Act could not limit the royalties paid to the Tribe.

The Secretary petitioned for rehearing en banc on two issues: Whether the Secretary was precluded from establishing market value for royalty purposes in excess of the State Pricing Act, and whether the court of appeals had erred on limiting the use of dual accounting to particular situations. (After the suit had been brought, the Secretary had begun requiring all lessees to maintain dual accounting systems.) Thus, the Department of the Interior prevailed on the issues on which it petitioned for rehearing.

Jicarilla Apache Tribe v. Supron Energy Corp., __F.2d___, Nos. 81-1680 (10th Cir. Jan. 23, 1986). D. J. # 90-2-18-139.

Attorneys: Maria A. Iizuka (FTS 633-2753) and Anne S. Almy (FTS 633-2749) Land and Natural Resources Division.

UNITED STATES ATTORNEYS' OFFICE

WESTERN DISTRICT OF TEXAS

5TH CIRCUIT HOLDS THAT FEDERAL PRISONERS MUST EXHAUST THEIR ADMINISTRATIVE REMEDIES AS A CONDITION OF PURSUING THEIR BIVENS CONSTITUTIONAL TORT CLAIMS FOR MONETARY DAMAGES IN FEDERAL COURT.

This Bivens constitutional tort against individual prison employees' sought relief only in the form of monetary damages, based on allegations of 8th Amendment violations of denial of medical care. The lower court dismissed the case, and the 5th Circuit upheld dismissal for failure to exhaust administrative remedies, stating it perceived "no statutory, constitutional or persuasive policy reason to excuse" federal prisoners from application of the exhaustion requirement simply because a prisoner selfstyles the case a Bivens action and seeks only monetary relief. It joined the holding in Brice v. Day, 604 F.2d 664 (10th Cir. 1979), requiring exhaustion and specifically rejected non-exhaustion rulings of the 3d and 10th Circuits in Muhammad v. Carlson, 739 F.2d 122 (3d Cir. 1984) and Goar v. Civiletti, 688 F.2d 27 (6th Cir. 1982). The 5th Circuit stated "a broad exhaustion requirement is particularly appropriate in federal prisoner complaints against prison officials relating to their conditions of or treatment during confinement."

Hessbrook v. Lennon, 777 F.2d 999 (5th Cir. 1985), D. J. # JJF:JLE:157-76-896

Attorney: Hugh P. Shovlin (FTS 730-4250), Assistant United States Attorney, Western District of Texas.

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%

NOTE: When computing interest at the daily rate, round (5/4) the product (*i.e.*, the amount of interest computed) to the nearest whole cent.

For cumulative list of Federal Civil Postjudgment Interest Rates effective October 1, 1982, through December 19, 1985, *see United States Attorneys' Bulletin*, Vol. 34, No. 1, Page 25, January 17, 1986.

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Tennessee, M	Joe B. Brown
Tennessee, W	W. Hickman Ewing, Jr.
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Executive Office for United States Attorneys

United States Attorneys' Bulletin

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TABLE OF CONTENTS

Page

COMMENDATIONS 133

CLEARINGHOUSE 134

POINTS TO REMEMBER
  Personnel 135
  Tax Division Revises Its Criminal Case Transmittal Letter 135

CASENOTES
  OFFICE OF THE SOLICITOR GENERAL 135
  OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS 136
  CIVIL DIVISION 137
  LAND AND NATURAL RESOURCES DIVISION 140
  FEDERAL RULES 141
  UNITED STATES ATTORNEYS' OFFICES 142

APPENDIX
  Department Policy Regarding Special Masters (Memorandum of March 13, 1986, from Attorney General Edwin Meese III) 144
  Listing of Bluesheets in Effect 153
  United States Attorneys' Manual Transmittals 155
  Listing of United States Attorneys 165

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Please send change of address to Editor, *United States Attorneys' Bulletin*, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

COMMENDATIONS

The following Assistant United States Attorneys have been commended:

SAMUEL ALBA and WAYNE T. DANCE (Utah) by Mr. Vernon D. Kohl, Assistant Special Agent-in-Charge, Federal Bureau of Investigation, for their outstanding work in the preparation of and participation in the legal training of agents.

KAREN L. ATKINSON (Florida, Southern) by Mr. Paul A. Adams, Inspector General, Department of Housing and Urban Development, for her outstanding work in the prosecution of a housing rental subsidy fraud case.

J. MATTHEW CAIN (Ohio, Northern) by Mr. Joseph E. Griffin, Special Agent-in-Charge, Federal Bureau of Investigation, for his outstanding work in the successful conclusion of a loansharking case.

WAYNE T. DANCE (Utah) by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his fine performance in the successful investigation and prosecution of a drug trafficking case.

TODD A. FOSTER and MELVIN RAY PECHACEK (Texas, Southern) by Mr. Michael L. Grubich, Chief, Criminal Investigation Division, Internal Revenue Service, for their successful prosecution of a narcotics and tax fraud case.

THEODORE S. GREENBERG (Virginia, Eastern) by Mr. Roscoe L. Egger, Jr., Commissioner, Internal Revenue Service, for his contribution to the successful prosecution of a complicated tax fraud case.

JOHN R. HALLIBURTON (Louisiana, Western) by Major General A. M. Stroud, Jr., Adjutant General, State of Louisiana, Military Department, New Orleans, Louisiana, for his successful defense of the Louisiana National Guard.

FREDERICK W. KRAMER III (Georgia, Southern) by Mr. Paul A. Adams, Inspector General, Department of Housing and Urban Development, for his successful prosecution of former housing authority officials for misapplication of federal funds.

ARTHUR W. LEACH (Georgia, Southern) by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his assistance in the investigation and prosecution of an interstate transportation of stolen property and Hobbs Act case.

FREDERICK R. MANN (Florida, Southern) by Mr. Jeffrey B. Springer, Deputy Chief Counsel, Food and Drug Administration, for his superb work in the successful prosecution of a challenge to FDA's regulatory authority.

KAREN B. PETERS (Virginia, Western) by Assistant Attorney General F. Henry Habicht II, Land and Natural Resources Division, Department of Justice, for her successful prosecution of a case involving environmental and Title 18 offenses.

D. GREGORY WEDDLE (Georgia, Southern) by Mr. Andrew J. Duffin, Special Agent-in-Charge, Federal Bureau of Investigation, for his successful conclusion of a case involving a multi-state luxury automobile theft ring.

DAVID E. WILSON (Washington, Western) by Attorney General Edwin Meese III for his successful prosecution of members of the Neo-Nazi group, "The Order."

CLEARINGHOUSE

Memorandum on Procedures Governing Congressional Liaison

On January 14, 1986, the Attorney General issued a memorandum on procedures governing congressional liaison, which affects USAM Title 10-6.310.

In pertinent parts, the memorandum requires that any significant contact with Members of Congress or their staffs initiated by a Justice employee be cleared in advance with the Office of Legislative and Intergovernmental Affairs (OLIA). Similarly, any contacts or inquiries initiated by Members of Congress or their staffs should be reported immediately to OLIA if they involve discussion of existing or proposed legislation, congressional hearings, or investigations on sensitive matters. OLIA interprets "significant" contacts to include luncheon engagements where such matters may be discussed.

Requests for briefings, interviews, testimony by Department employees, or requests for the disclosure of non-public information must be in writing, signed by the Congressional Committee or subcommittee chairman, and addressed to the Attorney General or to the Assistant Attorney General for OLIA. All formal testimony must be submitted to OLIA for review and approval at least seven days prior to the hearing. Exceptions must be approved by the Assistant Attorney General for Legislative and Intergovernmental Affairs.

The Assistant Attorney General also must approve in advance the provision of technical legislative drafting assistance and the submission of any Department legislative requests or proposals.

All congressional correspondence with United States Attorneys' offices should continue to be handled according to the procedures found in USAM 1-8.000, subparagraph G, pages 2-3. USAM Title 10 is being revised to reflect the memorandum's new requirements.

A copy of the memorandum can be obtained from the Office of Legal Services, Room 1629, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530. Request CH-30.

(Executive Office)

POINTS TO REMEMBER

Personnel

On February 27, 1986, Joseph M. Whittle took the Oath of Office as the United States Attorney for the Western District of Kentucky.

Effective March 21, 1986, Reena Raggi was court appointed United States Attorney for the Eastern District of New York.

(Executive Office)

Tax Division Revises Its Criminal Case Transmittal Letter to Promote Case Disposition Under Its Major Count Policy

In an attempt to promote prompt disposition of criminal tax cases, the Tax Division has begun to advise United States Attorneys' offices in case transmittal letters that the timeliness of guilty plea offers should be considered in determining the appropriateness of a proposed guilty plea solely to a major count. The Tax Division's major count policy allows United States Attorneys' offices to accept a plea of guilty to the designated major count(s) without further approval of the Tax Division.

In assessing the value of a plea solely to the major count(s), United States Attorneys' offices are urged to consider the timing of the proffered plea as it relates to a prompt disposition of the case. Moreover, in accordance with United States Attorneys' Manual 9-27.420 and comments therein regarding the prompt disposition of cases, United States Attorneys' offices may insist upon guilty pleas to additional charges in those instances where the United States Attorney deems it appropriate. Disposition by a guilty plea to any additional counts previously authorized does not require further approval of the Tax Division. However, United States Attorneys' offices are reminded to contact the Criminal Section, Tax Division, before agreeing to a plea arrangement that does not include a plea to the designated major count(s).

For further information, contact Edward M. Vellines, Office of Policy and Tax Enforcement Analysis, Criminal Section, Tax Division, at FTS 633-3011.

(Tax Division)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A brief amicus curiae in Eichenlaub v. Yurky, 770 F.2d 1078 (3d Cir. 1985). The question is whether a pretrial detainee has a constitutional right to a hearing before a neutral tribunal before being transferred from one correctional facility to another.

A brief amicus curiae in City of Los Angeles v. Preferred Communications, 754 F.2d 1396 (9th Cir. 1985). The question presented is whether the complaint stated a claim that potential cable operators' First Amendment rights were violated by the city's refusal to allow those operators to use utility poles, conduits, and other public property to install a cable television system.

A brief amicus curiae in O'Connor v. Ortega, 764 F.2d 703 (9th Cir. 1985). The issue is whether a government psychiatrist has a reasonable expectation of privacy under the Fourth Amendment that would bar a search of his office after he had been placed on administrative leave.

A jurisdictional statement in Florida Power Corp. v. FCC, 772 F.2d 1537 (11th Cir. 1985). The issue is whether the Pole Attachment Act of 1978, 47 U.S.C. §224, effects an unconstitutional taking of property in violation of the Fifth Amendment.

A petition for certiorari in United States v. Afro-American Police Association, 779 F.2d 881 (2d Cir. 1985). The question is whether a remedial decree in a Title VII action may award hiring preferences based solely on race, ethnic background, or sex to persons who are not actual victims of the employer's discrimination.

A petition for certiorari in United States v. Doe, 774 F.2d 34 (2d Cir. 1985). The question presented is whether an Antitrust Division attorney may disclose grand jury materials from a criminal case to a Civil Division attorney contemplating a related civil action.

A petition for certiorari in Creighton v. Anderson, 766 F.2d 1269 (8th Cir. 1985). The issue is the proper showing to be made by a defendant claiming qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982).

A petition for certiorari in United States v. Merchants National Bank, 772 F.2d 1522 (11th Cir. 1985). The issue is whether, as a prerequisite to the government's maintenance of a civil suit under Section 3505 of the Internal Revenue Code, the IRS must have sent the lender a copy of the tax bill sent to the employer under Section 6303(a).

OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES
FEBRUARY 11 thru MARCH 11, 1986

HIGHLIGHTS

Death Penalty. The logjam has finally broken, and S. 239, our bill to reinstitute capital punishment in the federal criminal justice system, was favorably reported by the Senate Judiciary Committee on Thursday, February 20. The climate for such legislation has never been more favorable, due to public outrage over the Walker espionage case and recent terrorist incidents where the death penalty is widely agreed to be the only appropriate response. With action on S. 239, we now have hopes for Senate Judiciary Committee action on S. 238, our habeas corpus reform bill. If that can be cleared, the next major issue on the list is exclusionary rule reform, S. 237.

Terrorism Legislation. The Speaker has urged all relevant committees to produce anti-terrorism measures to be taken up by the House as a comprehensive anti-terrorism package.

1. The House Subcommittee on Crime reported out an anti-terrorism bill, H.R. 4294, which included a capital punishment provision for murders of Americans overseas. While we favor comprehensive death penalty legislation, we are supporting this narrow capital punishment proposal as a "foot in the door."

   Senator Specter's bill, S. 1429, passed the Senate on February 19. In a nutshell, the bill would extend federal criminal jurisdiction to assaults and murders of United States citizens overseas. This bill could be called the "Leon Klinghoffer bill" as it would enable us to reach persons who commit murders such as occurred during the *Archille Lauro* hijacking. Under existing law, we could clearly prosecute the *Achille Lauro* terrorist for kidnapping (under the hostage-taking statute proposed by the President and enacted in 1984) but probably could not prosecute for the Klinghoffer murder. S. 1429 would fill this gap.

Prevention of Sexual Molestation of Children in Indian Country. The Criminal Justice Subcommittee of the House Judiciary Committee conducted a hearing on H.R. 3826, a bill that would make sexual molestation of children in Indian country a felony offense. This bill would amend the Major Crimes Act, 18 U.S.C. §1153, to provide coverage for nonforcible sexual conduct involving children, and thus plug a gap that now exists in the Major Crimes Act. The Senate has already approved a virtually identical bill, S. 1818, and the House bill is scheduled for full House Judiciary Committee consideration on March 21.

CIVIL DIVISION

D.C. CIRCUIT RULES THAT DEPARTMENT OF LABOR'S DECISION NOT TO INSTITUTE ENFORCEMENT ACTIONS IS UNREVIEWABLE, BUT REMANDS CASE FOR DISTRICT COURT TO CONSIDER WHETHER SECRETARY'S ANNOUNCED STATUTORY INTERPRETATION IS ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW.

This case involves the Labor Department's enforcement of certain reporting provisions of the Labor-Management Reporting and Disclosure Act. Plaintiff union sought to require the Secretary to bring an action against Kawasaki Motor Corp. for failure to comply with these reporting requirements. Plaintiff also attacked the Secretary's general enforcement policies, which they claimed unfairly enforced these reporting provisions against unions, but not against employers. The district court dismissed all of plaintiff's claims.

The D.C. Circuit has now upheld the government's position that Heckler v. Chaney precludes judicial review of the Secretary's enforcement decisions, including his overall enforcement policies. However, the case was remanded back to the district court to consider whether certain statements made by the Secretary in his Statement of Reasons for not bringing an action against Kawasaki, which, in the panel's view, constituted announcements of statutory interpretation, are arbitrary, capricious, or not in accordance with law.

International Union, UAW v. Brock, ___ F.2d ___, Nos. 84-5051, 84-5864 (D.C. Cir. Feb. 11, 1986). D. J. # 145-10-1904.

Attorneys: Robert Greenspan (FTS 633-5428) and John Hoyle (FTS 633-3547), Civil Division.

D.C. CIRCUIT AFFIRMS DENIAL OF PRELIMINARY INJUNCTION IN OPM RULES CASE.

Several federal unions challenged new personnel rules issued by the Office of Personnel Management. The rules govern promotions and reductions-in-force in the federal civil service, and the application to federal employees of the overtime provisions of the Fair Labor Standards Act. The unions charged that the rules were made effective without proper notice and comment under the Administrative Procedure Act, were arbitrary and capricious, and would irreparably harm their members if permitted to stay in effect.

The district court rejected the unions' motion for a preliminary injunction, and the court of appeals has now affirmed. The court of appeals determined that there was no showing of irreparable harm by the unions, and little likelihood of success on the unions' claims of procedural deficiencies in the promulgation of the rules. The court of appeals did, however, observe that the unions had raised serious questions about the validity of two regulations. The court of appeals ordered that the mandate issue immediately, and that the parties proceed on the merits in the district court as expeditiously as possible.

American Federation of Government Employees v. Office of Personnel Management, ___ F.2d ___, Nos. 85-5976, 85-6034 (D.C. Cir. Feb. 12, 1986). D. J. # 145-156-478.

Attorneys: William Kanter (FTS 633-1597) and Richard Olderman (FTS 633-4053), Civil Division.

FIFTH CIRCUIT HOLDS PERSONNEL RECORDS OF FBI APPLICANT RELATING TO POLYGRAPH RECORDS EXEMPT FROM DISCLOSURE UNDER FOIA AND PRIVACY ACT.

Plaintiff was discharged from the FBI training academy and sought disclosure of his personnel files. The FBI turned over most of the requested material but withheld portions of certain documents on the ground that they pertained to polygraph records and related to intelligence methods. The portions of documents withheld referred to a summary of a polygraph examination given to plaintiff by the CIA when plaintiff had unsuccessfully sought employment with that agency.

The district court granted the government's motion for summary judgment after in camera inspection of the documents. The court of appeals affirmed. The court stressed that under the disclosure exemption provided by the Freedom of Information Act and the National Security Act, the CIA director may withhold even superficially innocuous information. The court also ruled that the materials were exempt from disclosure under the Privacy Act, under CIA regulations exempting records that pertain to intelligence sources or methods generally, and regulations specifically exempting polygraph records. The court rejected plaintiff's claim that the district court's findings were insufficiently specific, noting that requiring greater specificity might lead to indirect disclosure of the exempt information. The court also held that a summary of polygraph records is entitled to the same protection as the records themselves, emphasizing the broad power given the CIA director by Congress to protect intelligence methods.

Villanueva v. Department of Justice, ___F.2d___, No. 85-1220 (5th Cir. Feb. 12, 1986). D. J. # 145-12-5718.

Attorneys: Leonard Schaitman (FTS 633-3441) and Mark Stern (FTS 633-5534), Civil Division.

ELEVENTH CIRCUIT HOLDS THAT THE GOVERNMENT MUST JUSTIFY ITS POSITION WITH AFFIDAVITS WHEN IT REFUSES TO CONFIRM OR DENY THE EXISTENCE OF RECORDS RESPONSIVE TO A FOIA REQUEST.

This case involves a so-called "third party" Freedom of Information Act request in which the requester specifies a particular individual other than himself about whom he wants records. Such requests pose a special problem in that it will frequently be an intrusion upon the privacy of the subject of the request for the government even to confirm or deny that it has responsive records. On receipt of a third party request, therefore, the government generally asks the requester to show that the subject of the request has no objection, or that there is a public interest in disclosure that might outweigh the subject's privacy interest, before it will confirm or deny the existence of responsive records.

In this case, the district court upheld the FBI's refusal to confirm or deny the existence of records relating to an individual whom the requester asserts was an FBI informant. Summary judgment in favor of the FBI was entered even though it submitted no affidavits, either public or in camera, to justify its position. On appeal, the Eleventh Circuit held that, in the absence of any evidentiary record, the district court could not properly have fulfilled its obligation to conduct a de novo review of the government's position. Accordingly, the court of appeals remanded the case for further proceedings in which the FBI must submit affidavits justifying its refusal to confirm or deny the existence of the records that the plaintiff seeks.

Ely v. FBI, ___F.2d___, No. 84-3632 (11th Cir. Feb. 10, 1986). D. J. # 145-12-5559.

Attorneys: Leonard Schaitman (FTS 633-3441) and Marc Johnston (FTS 633-3305), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

NEWLY CONSTRUCTED FISH POND BECOMES WETLAND SUBJECT TO CORPS' JURISDICTION UNDER SECTION 404 OF THE CLEAN WATER ACT.

Citing the Supreme Court's recent decision in Riverside Bayview Homes, the Eleventh Circuit affirmed the district court's finding that the area was a wetland subject to the permit requirements of Section 404 of the Clean Water Act. Conant had attempted to construct a "fish pond" on the property. The court also affirmed the district court's ruling that neither the agricultural exception, 33 U.S.C. §1344(f)(1)(A), nor the "stock pond" exception, 33 U.S.C. §1344(f)(1)(c), applied to the facts here, since the activity here was to create a new use rather than make changes to a pre-existing use.

Conant v. United States, ___F.2d___, No. 84-3717 (11th Cir. Feb. 7, 1986). D. J. # 90-5-1-1-1940.

Attorneys: Albert M. Ferlo, Jr. (FTS 633-2774) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

SUPPLEMENTAL DECLARATION OF RESTRICTIONS DEEMED A COVENANT SUBJECT TO CALIFORNIA DOCTRINE OF "CHANGED CIRCUMSTANCES."

The Rossmoor Corporation, a real estate development firm controlled by plaintiffs, owns a tract of property in Orange County, California, beneath the extended center line of the approach corridor to the main runway of the United States Marine Corps Air Station--El Toro. In settlement of another matter, Rossmoor entered a "Supplemental Declaration of Restrictions" ("SDR") with the United States, by which Rossmoor agreed to limit development to certain low-density uses stated in the SDR. Rossmoor later conveyed a portion of the restricted parcel to Great American, which constructed a warehouse on the lot in violation of the terms of the SDR.

In 1982, Rossmoor sued the United States, contending that the SDR created covenants in favor of the United States; that under the California state law "doctrine of changed circumstances" covenants may be declared ineffective where, due to changed circumstances, they no longer serve their original intended purpose and have become unreasonably burdensome to the estate holder; and that the doctrine should be found applicable because subsequent studies showed the restrictions were not needed for safety purposes. In response to Rossmoor's complaint, the United States contended, inter alia, that the SDR created a permanent easement. The government also filed a cross-complaint against Great American, seeking removal of the warehouse. Great American, in turn, asserted that the government was estopped from seeking removal of the warehouse.

The Ninth Circuit has affirmed in part and reversed in part the lower court's decision, which sustained the agreement and supported the government's position that the local doctrine of changed circumstances did not apply to the SDR. The circuit court held that the SDR created covenants and that the California doctrine of changed circumstances was applicable because that doctrine was neither "aberrant nor hostile to the interests of the United States" within the meaning established in United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973). The court also held the United States was not estopped from seeking removal of Great American's warehouse. The case was remanded to the district court for a determination of whether the covenants should now be declared ineffective under the changed circumstances doctrine.

Cortese and Great American Federal Savings and Loan Assn v. United States, 782 F.2d 845, Nos. 84-5841, 84-5846 (9th Cir. Feb. 12, 1986). D. J. # 90-1-5-2166.

Attorneys: Robert L. Klarquist (FTS 633-2731) and Anne S. Almy (FTS 633-2749), Land and Natural Resources Division.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 23(b). Trial by Jury or by the Court; Jury of Less Than Twelve.

On appeal from their convictions of narcotic violations, defendants contend that the trial court erred in accepting the verdict of eleven jurors when, after jury deliberations began, one juror was excused for a religious holiday. Defendants argue that Rule 23(b), which provides that a verdict may be returned by a jury of less than twelve, applies only to situations where a juror suffers permanent or lengthy incapacitation.

The court of appeals rejected defendants' limited application of Rule 23(b). The 1983 amendment to the Rule provides that if a judge finds it necessary to excuse a juror for "just cause" after deliberations have started, a valid verdict may be returned by the remaining eleven. The "just cause" standard encompasses a variety of temporary problems and does apply to the situation at bar. The court further noted that while the crime occurred in 1981, the Ex Post Facto Clause of the Constitution, Art. I, § 9, cl. 3, does not bar application of the 1983 amendment since no constitutionally guaranteed right is involved.

By excusing one juror for a religious holiday and permitting an eleven person jury to proceed with deliberations, the court of appeals held that the trial court did not abuse its discretion.

(Affirmed.)

United States v. Stratton, 779 F.2d 820 (2d Cir. Dec. 13, 1985).

OFFICES OF UNITED STATES ATTORNEYS

ILLINOIS, SOUTHERN

SEVENTH CIRCUIT ADOPTS DELIBERATE BY-PASS DOCTRINE IN INMATE INSTITUTION DISCIPLINARY CASES.

The petitioners, inmates incarcerated at the United States penitentiary in Lewisburg, Pennsylvania, were found guilty by the Institution Disciplinary Committee of conspiracy to assault and to murder another inmate. Each petitioner made attempts to pursue the three levels of administrative review set forth in 28 C.F.R. §542.10, but abandoned their attempts for months at a time, filed incomplete requests for review, and failed to abide by the time limits imposed. The lower court found that the prisoners had failed to exhaust their administrative remedies, and the deliberate by-pass of administrative remedies was fatal to the lawsuit. The Seventh Circuit affirmed. This opinion is notable because some jurisdictions have refused to adopt the deliberate by-pass doctrine in such cases.

Anderson and Kirk v. Miller, Warden, U.S. Penitentiary-Marion, 772 F.2d 375 (7th Cir. 1985).

Attorney: Laura J. Jones (Assistant United States Attorney, Benton, Illinois) FTS 958-6686.

MISSISSIPPI, NORTHERN

PRETRIAL DETENTION AUTHORIZED FOR INDIGENT UNABLE TO MEET FINANCIAL CONDITION FOR RELEASE.

Defendant, an indigent, was arrested for possessing counterfeit money and possessing a firearm while a convicted felon. A $25,000 secured bond was required by the magistrate as a condition of pretrial release but the amount was later reduced to $15,000. The magistrate denied defendant's motion to further reduce the bond to unsecured status and authorized pretrial detention. Defendant sought reconsideration of the magistrate's order by the district court, asserting that under the Bail Reform Act, 18 U.S.C. §3142, his detention was not appropriate. Defendant contended that 18 U.S.C. §3142(c) expressly prohibited imposition of a financial condition that results in the pretrial detention of a person unable to meet the financial condition for release.

The district court upheld the detention order, and the Fifth Circuit affirmed, finding that Section 3142(c) does not necessarily require the release of a person who proves to be unable to meet a financial condition of release. The court determined that if a judicial authority determines that a monetary secured bond is the only means short of detention of assuring the appearance of an accused, but the accused later establishes he cannot meet the bond, the judicial officer can consider reducing the bond. Upon reconsideration, if it is determined that the bond is necessary to assure the appearance of the accused, then detention is appropriate if it was concluded there was no available condition or combination of conditions set forth in 18 U.S.C. §3142(c) for pretrial release that would reasonably assure the appearance of the accused. The Fifth Circuit remanded the matter to the district court solely for issuance of a pretrial detention order in compliance with the strict procedural requirements of 18 U.S.C. §3142(i).

United States v. Westbrook, ___F.2d___, No. 85-4892 (5th Cir. Jan. 16, 1986).

Attorney: Thomas W. Dawson (Assistant United States Attorney, Mississippi, Northern) FTS 490-4926.

Office of the Attorney General
Washington, D.C. 20530

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III
Attorney General

SUBJECT: Department Policy Regarding Special Masters

These guidelines are promulgated in order to give central direction to the government's positions in cases involving special masters. They set out the Department's policy on the use of masters, the criteria by which master appointments are to be assessed, and procedures which attorneys for the United States are to follow. For the first time, the Department of Justice here adopts a policy with respect to the costs of special masters in light of the doctrine of sovereign immunity. The guidelines are to be followed in all cases tried by counsel under the Attorney General's direction, except those in the Supreme Court of the United States and those in state courts under the McCarran Amendment, 43 U.S.C. § 666.

I. General Policy on the Use of Masters

It is the position of the Justice Department that, as a general matter, the judicial power vested by the Constitution in the courts is to be exercised by judges and their legislatively created subordinates, such as United States Magistrates. This policy accords with Rule 53 of the Federal Rules of Civil Procedure, under which the appointment of special masters and other non-legislative judicial delegees is to be considered the exception rather than the rule. Special masters are an acceptable aid to judicial officers in a narrow range of cases, but they are not a substitute for Article III judges.

The appropriate role for special masters is in situations where the demands on the decisionmaker's time are great but the need for judicial resolution is minimal. Masters can be useful where decisions are (1) routine, (2) large in number, (3) minimally connected to the substantive issues in a case, and (4) not sufficiently difficult or significant to require a constitutional or legislative officer. A principal example is the class of cases involving unusually extensive discovery proceedings, in which a large number of minor decisions must be made concerning questions such as discoverability and privilege. In situations of that sort, the special master is a legitimate and valuable part of the judicial process. Masters can also play a role in the remedial stage of a proceeding, where there is a need for monitoring of a judicial order clear enough to require no adjudicative decisions by the master.

The fact that masters are not substitutes for judges has several significant consequences:

1. Masters should not be employed simply to alleviate congestion or lighten workloads, if to do so would result in a master performing a judge's function. The appropriate level of staffing for the federal courts is a decision for Congress, not for individual judges. The fact that a case is large or complex, and thereby represents an above-average burden on scarce judicial resources, will generally mean that the judge should spend more time on the case, not that ad hoc officers should be appointed.

2. The fact that a case presents difficult technical issues should not be considered as weighing in favor of the appointment of a master. Hard factual problems are to be addressed through the normal techniques of trial, including the presentation of expert testimony. If necessary, the trial court can appoint its own expert witnesses. It is a serious error, however, for a master, who is a hearing officer and fact-finder, to be confused with someone who develops and presents evidence. Masters should not be appointed for this purpose, and their use as de facto experts should be resisted when it occurs.

3. Masters are not appropriate when their decisions will have to be reviewed by the judge in substantial detail. Such an arrangement is uneconomic and, more importantly, inadequately serves the right of litigants to have any significant question resolved in the first instance by a constitutional or statutory judicial officer.

4. Masters should not be employed as part of non-judicial alternative dispute resolution methods. The United States favors the use of alternative dispute resolution methods such as minitrials, arbitration and mediation. Insofar as these methods are not part of the judicial process proper, masters, who are ad hoc judicial officers, should not be used as neutral parties in such situations. And insofar as encouraging or facilitating alternative dispute resolution requires the judgment or authority of the court, it is not appropriate for master involvement because the use of masters should be restricted to more ministerial functions.

5. Masters should not be entrusted with issues that are novel, difficult, closely related to the outcome of the case, or significant from the point of view of policy. Such issues demand the attention of life-tenured judges who have gone through the rigorous process of judicial selection, and are insulated in their decisionmaking by the constitutional protections surrounding their office.

6. It is inappropriate for a court to use a master to extend its own power. Masters should not be a tool for bringing under the control of the court matters that otherwise would be resolved elsewhere. This is particularly important when the United States is a party, because in such cases the enhancement of judicial power will usually be at the expense of a coordinate branch of government.

7. Masters should be employed only in cases where their utility justifies the additional cost. Judges and magistrates are already made available at public expense, as a result of the decision that certain services are to be provided without cost to litigants. The imposition on the parties of additional expenses can be justified only by the prospect of a substantial increase in litigation efficiency; such an imposition merely to save the time of officers that Congress has determined shall be available to all is improper.

II. Procedures in Master Cases

A. The Decision on Appointment

1. Application of the Criteria

The Department of Justice favors the use of special masters only in the narrow class of lawsuits discussed above. Accordingly, before proposing to the court that a master be appointed, attorneys for the United States must analyze the case in light of the principles set out here. A master should be suggested only if counsel judge that (1) the case (or order to be implemented) contains enough of the routine, minor issues that are appropriate for master resolution to justify the additional expense and delay, and (2) it appears very unlikely that the master would function in an improper fashion. The same considerations will govern the response of counsel of the government to another party's suggestion that a master be employed.

2. Sua Sponte Appointments

The Department believes that courts should appoint masters on their own motion only after consultation with the parties. Accordingly, any time a judge raises the possibility that a master be appointed sua sponte, government counsel should request the opportunity to be heard on both the advisability of the appointment and the appropriate role of the master. When a court appoints a master without discussing the possibility beforehand, the United States will generally seek a reconsideration of the decision. This should be done even when we agree with the appointment, in order to encourage the court to make its reasons explicit and, if possible, to adopt the principles enunciated here. In the very exceptional case where a motion for reconsideration would seriously undermine the government's overall position, litigation strategy may dictate that a sua sponte appointment not be challenged at all.

3. Acquiescence in Appointments

Sound litigation strategy also may dictate that the government acquiesce in the appointment of a master even when the Department's policies would indicate opposition. Counsel may decide that a major concession by another party justifies such acquiescence, or that a clear intention by the judge that a master will be employed should not be resisted. Acquiescence should be the exception and not the rule, however, and should never occur when there is a significant danger that the master would perform essential judicial functions or operate significantly to increase the power of the court relative to that of another branch or level of government.

B. Selection of the Master

1. Procedures

Because a special master is an ad hoc officer appointed for a particular case and paid for by the litigants, selection of the individual who is to act as a special master should be as much in the hands of the parties as feasible. Whenever possible, the parties should consult together and agree on a master, or on a list of suggested names. Similarly, the litigants should have an opportunity to comment on any candidate the court is considering, and may request the judge to invite comments on several possible masters. Unless case-specific considerations strongly dictate otherwise, the United States will press for the exercise of these procedural rights. When a judge simultaneously announces his decision to appoint a master and the name of the individual who is to serve, the government will usually request that the appointment be reconsidered along with the decision to make it, and will then comment on the prospective master as well as on the advisability of using one.

2. Criteria for Selection

a. Qualifications. In choosing or commenting on proposed masters, the United States will be guided primarily by considerations of technical competence and impartiality. A master is a hearing officer, not an expert. Therefore, while it is not always vital that a master be closely conversant with the subject matter of the case, it is necessary that he be thoroughly familiar with any procedural questions he is to handle -- privilege issues, for instance.

b. Independence. It is also important that the master be unbiased, not only as between the parties, but in his relationship with the judge: it is the duty of both the master and the judge to disclose to the parties any personal or business association between them that might impair this independence of judgment. Moreover, the master should exercise his independent judgment, and the judge should review the master's decisions on the merits. Accordingly, the United States must examine carefully the likely impartiality of any prospective master who is a close associate of the judge making the appointment.

c. Cost. Economy must also be considered in assessing possible masters. Individuals whose time is expensive, or who operate in institutions the services of which are costly, are to be avoided in favor of similarly qualified and unbiased candidates who will involve less expense.

d. Improper Role. Finally, in analyzing a candidate's desirability, counsel should take into account any indications that he would diverge from the appropriate role of the master. Any reason to believe that the master would wish to exercise significant judicial power, or would be disposed to seek to aggrandize the authority of the court, must weigh against the candidate.

Generally, the government will consider first United States Magistrates and semi-active judges, whose qualifications under these criteria will tend to be strong.

3. Implementation by Divisions

In implementing these guidelines, each litigating division of the Department shall decide whether its work involves masters often enough to warrant a review of possible candidates. It is anticipated that the Civil Division, Civil Rights Division, and Land and Natural Resources Division will probably find such a review appropriate; others may also. These divisions shall develop, by June 13, 1986, specific criteria of acceptability along the lines outlined here and shall, if the Assistant Attorney General finds it appropriate, prepare lists of possible appointees who would probably be acceptable to the Department in cases of various kinds. Division heads shall establish mechanisms to ensure that government litigators in cases that may involve masters have these criteria and lists available at the earliest possible stage. These mechanisms shall be reported to the Deputy and Associate Attorneys General and the other litigating divisions by July 13, 1986.

C. Statement of Masters' Functions

These guidelines delineate the functions of masters that the Department of Justice believes to be appropriate. It is important that, whenever a master is appointed, his role in the case be made explicit at the outset. Accordingly, the United States will always propose a clear statement of the work the master is to do, and, if appropriate, a reference to the functions he is not to undertake. Whenever possible, the parties should agree to such a statement and submit their agreement to the judge. When this is not feasible, the government will urge the court to make an explicit statement of function. The United States will press for a mandate for the master consistent with these policies.

It is also important that clear provision be made at the outset for fees and expenses. The parties should agree to, or the court should adopt after comment, an understanding as to the master's billing rate, his authority to employ assistants and their rate of compensation, the expenses that will be allowed, and any other funding matter, including the procedures that are to be used to monitor and verify spending. The United States will always resist any expenditures by the master in the absence of such an understanding. Of course, the government will also insist that the master be allowed only such expenses as are necessary to effective operation. Litigating divisions that employ masters frequently, by May 13, 1986, should establish more specific guidelines concerning proper categories and levels of expenditures.

D. Monitoring

Throughout any litigation involving a special master, government counsel shall pay close attention to the master's conduct of his office. Any deviation from the role assigned by the court, or the role endorsed for masters in general under these guidelines, should be reviewed with appropriate officers of the Department and should generally be brought to the attention first of the master and then of the court if that proves necessary. If this deviation persists in the face of objection by the government, serious considerations will be given to a motion to remove the particular master or to revoke the order of reference altogether.

Similarly, financial accountability must be maintained during the case. Counsel generally should raise immediately any doubts concerning the level or types of expenditure being made by the master. Frequently, of course, other parties (on both sides) will have interests similar to the government's, and should be consulted when cost issues arise.

III. Payments of Masters' Costs by the United States

The United States are sovereign, and are subject to suit only by their own consent. Courts will assess judgments against the sovereign only on a showing of an explicit and unequivocal waiver of this immunity. The fees and expenses of special masters are a cost of court, paid by parties pursuant to judgments; Congress has not enacted legislation generally waiving sovereign immunity with respect to this category of costs. Accordingly, except in cases where there is a specific statutory waiver that covers the costs of special masters, the United States may not be compelled to pay them. These principles are elaborated on in the first attached memorandum from the Office of Legal Counsel.

The government may elect, nevertheless, voluntarily to pay some or all of the costs of a master in a particular case (this point is elaborated on in the second attached memorandum from the Office of Legal Counsel). When the United States proposes a special master, or agrees to one proposed by another party or the court, arrangements will be made for the government to pay its proper share. Counsel may enter into an agreement under which each party will pay some portion of the costs approved by the court, or may provide that the losing party or parties will pay all of the master's expenses.

When a master is appointed over the government's objection, or with the government's acquiescence in a situation where these guidelines would normally call for opposition to appointment, the United States will refuse to pay any fees or expenses, and will notify the court of that refusal and the grounds therefore, when:

(1) government counsel believe the master to be unqualified or seriously biased;

(2) it appears clear that the master will be performing essential judicial functions with respect to issues closely related to the outcome of the case or sensitive from the point of view of policy;

(3) there is strong reason to believe that the use of the master will increase the authority of the court over another branch or level of government in derogation of constitutional principles; or

(4) the master's work will clearly have to be reviewed by the judge to such an extent as to render the master largely redundant.

Subject to procedures and policies established by the heads of litigating divisions, the United States may refuse to pay a master's costs for any other reason comparable in importance to those set out here. The decision not to pay for an officer the court has appointed should be approved by the responsible Assistant Attorney General.

Only in the rarest of cases will litigation strategy lead to a payment in a case where these guidelines dictate otherwise. While litigators usually will be disinclined to offend the judge conducting their proceedings, the United States must be willing to rely on the judiciary's ability to put aside unrelated irritations in making substantive decisions. Refusal to pay for a court-appointed master should always be explained carefully, with stress laid on the gravity of the considerations that have led to the decision, and on the imperative nature of Department policy as set forth here.

IV. Internal Procedures for Payment

Once a special master has been appointed, and the government has determined that the appointment is appropriate or that the government will acquiesce and pay its share of the fees and expenses of the master, the government attorney will submit an obligation of payment form to the administrative office for the division or U.S. Attorney's office. Until the Justice Management Division prescribes a form for special masters, OBD-47, "Request and Authorization for Fees and Expenses of Witnesses," will be used. The attorney should note on the form that it is being used for a special master. The division administrative officer will forward the OBD-47 to Financial Operations Services; administrative officers for U.S. Attorneys' offices, to the U.S. Marshal's office for that district.

Internal procedures for paying the master will follow the same procedures used for payment to experts and consultants. The master will submit an itemized invoice (OBD-84 and 85, "Pay Voucher for Special Services," may be used for this purpose) to the government attorney who, in turn, will submit the invoice to the administrative officer to be forwarded either to Financial Operations Services or the U.S. Marshal's office, as prescribed above. Upon the order of the court, partial or advance payment of fees and expenses will be handled through these same procedures.

Fees and expenses of Land Commissioners will not be paid by the Department. Funds for the payment of Land Commissioners are appropriated to the Administrative Office of the U.S. Courts, and the commissioners should look to that office for their fees and expenses.

V. Review of These Guidelines

The principles set out here must be tested and reviewed in light of the Department's ongoing experience with special masters, and in particular its experience under these guidelines. Accordingly, as of this date, each Assistant Attorney General heading a division that uses masters will institute procedures for the analysis of cases involving masters, with special attention to the effect of these guidelines. Counsel in master cases should report any need for clarification or expanded coverage, and any difficulties with other parties or the courts that appear to result from the application of these policies. The Assistant Attorney General for Legislative and Intergovernmental Affairs will report on any congressional reaction. In order to coordinate review, the Litigation Strategy Working Group will continue to meet periodically to discuss masters issues; Assistant Attorneys General should call any significant court reactions to the guidelines to the Group's attention.

LISTING OF ALL BLUESHEETS IN EFFECT
MARCH 28, 1986

AFFECTS USAM	TITLE NO.	DATE	SUBJECT
2-3.110	TITLE 2	2/03/86	Prompt Notification of Contrary Recommendations
9-1.177	TITLE 9	12/31/85	Authorization for Negotiated Concessions in Organized Crime Cases
9-2.132*	TITLE 9	12/31/85	Policy Limitations on Institution of Proceedings - Internal Security Matters
9-2.133*	TITLE 9	4/09/84	Policy Limitation on Institution of Proceedings, Consultation Prior to Institution of Criminal Charges
9-2.151*	TITLE 9	12/31/85	Policy Limitations - Prosecutorial and Other Matters, International Matters
9-2.160*	TITLE 9	7/18/85	Policy with Regard to Issuance of Subpoenas to Attorneys for Information Relating to the Representation of Clients
9-6.400*	TITLE 9	11/06/85	Pretrial Detention Hearing Reporting Requirements
9-11.368(A)*	TITLE 9	2/04/86	Amendment to Rule 6(e) Federal Rules of Criminal Procedure Permitting Certain Disclosure to State and Local Law Enforcement Officials
9-18.280*	TITLE 9	8/09/85	Policy Concerning Application of Insanity Defense Reform Act of 1984 Offenses. Committed Before Date of Enactment
9-20.215	TITLE 9	2/11/86	Policy Concerning State Jurisdiction Over Certain Offenses in Indian Reservations
9-21.340 to 9-21.350*	TITLE 9	3/12/84	Psychological/Vocational Testing; Polygraph Examinations for Prisoner-Witness Candidates

* Approved by Advisory Committee, being permanently incorporated.
** In printing.

LISTING OF ALL BLUESHEETS IN EFFECT
MARCH 28, 1986

AFFECTS USAM	TITLE NO.	DATE	SUBJECT
9-60.291; 9-60.292*	TITLE 9	8/16/85	Interception of Radio Communications: Unauthorized Reception of Cable Service
9-90.330*	TITLE 9	5/06/85	Computer Espionage
9-90.600*	TITLE 9	5/06/85	Registration
9-103.130*	TITLE 9	12/31/85	Revision to the Investigative and Prosecutive Guidelines for the Controlled Substance Registrant Protection Act
9-111.000*	TITLE 9	9/18/85	Policy with Regard to Forfeiture of Assets Which Have Been Transferred to Attorneys As Fees For Legal Services
9-131.110*	TITLE 9	4/09/84	Hobbs Act Robbery
10-2.186	TITLE 10	9/27/85	Grand Jury Reporters
10-6.213*	TITLE 10	11/22/85	Reporting of Immediate Declinations of Civil Referrals
10-8.120*	TITLE 10	1/31/86	Policy Concerning Handling of Agency Debt Claim Referrals Where the Applicable Statute of Limitations has Run

UNITED STATES ATTORNEYS' MANUAL--TRANSMITTALS

The following United States Attorneys' Manual Transmittals have been issued to date in accordance with USAM 1-1.500.

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 1	(Transmittals A2 through A10 have been superseded.)			
	A11	2/22/84	2/10/84	Complete revision of Ch. 1, 2
	A12	3/19/84	2/17/84	Complete revision of Ch. 4
	A13	3/22/84	3/9/84	Complete revision of Ch. 8
	A14	3/23/84	3/9 & 3/16/84	Complete revision of Ch. 7, 9
	A15	3/26/84	3/16/84	Complete revision of Ch. 10
	A16	8/31/84	3/02/84	Complete revision of Ch. 5
	A17	3/26/84	3/26/84	Complete revision of Ch. 6
	A18	3/27/84	3/23/84	Complete revision of Ch. 11, 13, 14, 15
	A19	3/29/84	3/23/84	Complete revision of Ch. 12
	A20	3/30/84	3/23/84	Index to Title 1, Table of Contents to Title 1
	A21	4/17/84	3/23/84	Complete revision of Ch. 3
	A22	5/22/84	5/22/84	Revision of Ch. 1-6.200
	AAA1	5/14/84		Form AAA-1
	B1	7/01/85	8/31/85	Revision to Ch. 1-12.000
	B2	8/31/85	7/01/85	Revisions to Ch. 11
TITLE 2	(Transmittals A2 through A4 have been superseded.)			
	A5	2/10/84	1/27/84	Complete revision of Title 2-replaces all previous transmittals

*Transmittal is currently being printed.

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 2	A11	3/30/84	1/27/84	Summary Table of Contents to Title 2
	AAA2	5/14/84		Form AAA-2
TITLE 3	(Transmittal A2 has been superseded.)			
	A3	10/11/83	8/4/83	Complete revision of Title 3-replaces all previous transmittals
	AAA3	5/14/84		Form AAA-3
TITLE 4	(Transmittals A2 through A6 have been superseded.)			
	A7	4/16/84	3/26/84	Complete revision of Ch. 7, 8, 12
	A8	4/16/84	3/28/84	Complete revision of Ch. 2, 14, 15
	A9	4/23/84	3/28/84	Complete revision of Ch. 3
	A10	4/16/84	3/28/84	Complete revision of Ch. 10
	A11	4/30/84	3/28/84	Complete revision of Ch. 1, 9, Index to Title 4
	A12	4/21/84	3/28/84	Complete revision of Ch. 6
	A13	4/30/84	3/28/84	Complete revision of Ch. 4
	A14	4/10/84	3/28/84	Complete revision of Ch. 13
	A15	3/28/84	3/28/84	Complete revision of Ch. 5
	A16	4/23/84	3/28/84	Complete revision of Ch. 11
	AAA4	5/14/84		Form AAA-4
	B1	11/05/85	8/01/85	Revisions to Chapters 1-8, and 11-15
TITLE 5	(Transmittal A2 has been superseded.)			
	A3	3/22/84	3/5/84	Complete revision of Ch. 1, 2, 3 (was 2A)
	A4	3/28/84	3/12/84	Complete revision of Ch. 12 (was 9C)
	A4	undated	3/19/84	Complete revision of Ch. 5 (was Ch. 4), 6, 8

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 5	A5	3/28/84	3/20/84	Complete revision of Ch. 9, 11 (was 9B)
	A6	3/28/84	3/22/84	Complete revision of Ch. 7
	A7	3/30/84	3/20/84	Complete revision of Ch. 10 (was 9A)
	A8	4/3/84	3/22 & 3/26/84	Complete revision of Ch. 13, 14, 15, Table of Contents to Title 5
	A9	12/06/84	11/01/84	Revisions to Chapter 1
	A11	4/17/84	3/28/84	Complete revision of Ch. 4 (was Ch. 3)
	A12	4/30/84	3/28/84	Index to Title 5
	AAA5	5/14/84		Form AAA-5
	B1	6/03/85	5/01/85	Revisions to Ch. 1 and Ch. 4
TITLE 6	A2	3/23/84	3/2/84	Complete revision of Title 6-replaces all prior transmittals
	A3	12/19/84	12/14/84	Revision to Ch. 4 and Index
	AAA6	5/14/84		Form AAA-6
	B1	2/14/86	10/01/85	Revisions to Chapters 1-4, 6
TITLE 7	(Transmittals A2 and A3 have been superseded.)			
	A4	1/6/84	11/22/83	Complete revision to Title 7-replaces all prior transmittals
	A12	3/3/84	12/22/83	Summary Table of Contents to Title 7
	AAA7	5/14/84		Form AAA-7
TITLE 8	AAA8	5/14/84		Form AAA-8
	B1	10/01/85	6/01/85	Complete revision to Title 8 (Supersedes A1, A2, and A12
TITLE 9	(Transmittals A5 through A12, A14, A47, A49 A50, A56 and A61 have been superseded.)			
	A13	1/26/84	1/11/84	Complete revision of Ch. 132, 133

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A14	2/10/84	1/27/84	Revisions to Ch. 1 (Superseded by A78)
	A15	2/1/84	1/27/84	Complete revision of Ch. 8
	A16	3/23/84	2/8/84	Complete revision of Ch. 135, 136
	A17	2/10/84	2/2/84	Complete revision of Ch. 39
	A18	2/3/84	2/3/84	Complete revision of Ch. 40
	A19	3/26/84	2/24/84	Complete revision of Ch. 21
	A20	3/23/84	2/8/84	Complete revision of Ch. 137, 138
	A21	3/19/84	2/13/84	Complete revision of Ch. 34
	A22	3/30/84	2/01/84	Complete revision of Ch. 14
	A23	8/31/84	2/16/84	Revisions to Ch. 2
	A24	3/23/84	2/28/84	Complete revision of Ch. 65
	A25	3/26/84	3/7/84	Complete revision of Ch. 130
	A26	3/26/84	2/8/84	Complete revision of Ch. 44
	A27	3/26/84	3/9/84	Complete revision of Ch. 90
	A28	3/29/84	3/9/84	Complete revision of Ch. 101
	A29	3/26/84	3/9/84	Complete revision of Ch. 121
	A30	3/26/84	3/19/84	Complete revision of Ch. 9
	A31	3/26/84	3/16/84	Complete revision of Ch. 78
	A32	3/29/84	3/12/84	Complete revision of Ch. 69
	A33	3/29/84	3/9/84	Complete revision of Ch. 102
	A34	3/26/84	3/14/84	Complete revision of Ch. 72
	A35	3/26/84	2/6/84	Complete revision of Ch. 37
	A36	3/26/84	2/6/84	Complete revision of Ch. 41
	A37	4/6/84	2/8/84	Complete revision of Ch. 139

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A38	3/29/84	2/28/84	Complete revision of Ch. 47
	A39	3/30/84	3/16/84	Complete revision of Ch. 104
	A40	4/6/84	3/9/84	Complete revision of Ch. 100
	A41	4/6/84	3/9/84	Complete revision of Ch. 110
	A42	3/29/84	3/14/84	Complete revision of Ch. 64
	A43	4/6/84	3/14/84	Complete revision of Ch. 120
	A44	4/5/84	3/21/84	Complete revision of Ch. 122
	A45	4/6/84	3/23/84	Complete revision of Ch. 16
	A46	2/30/84	2/16/84	Complete revision of Ch. 43
	A47	4/16/84	3/28/84	Revisions to Ch. 7 (Superseded by A63)
	A48	4/16/84	3/28/84	Complete revision of Ch. 10
	A49	4/16/84	3/28/84	Revisions to Ch. 63 (Superseded by A74)
	A50	4/16/84	3/28/84	Revisions to Ch. 66 (Superseded by A60)
	A51	4/6/84	3/28/84	Complete revision of Ch. 76, deletion of Ch. 77
	A52	4/16/84	3/30/84	Complete revision of Ch. 85
	A53	6/6/84	3/28/84	Revisions to Ch. 4
	A54	7/25/84	6/15/84	Complete revision of Ch. 11
	A55	4/23/84	4/6/84	Complete revision of Ch. 134
	A56	4/30/84	3/28/84	Revisions to Ch. 42 (Superseded by A87)
	A57	4/16/84	3/28/84	Complete revision of Ch. 60, 75
	A58	4/23/84	4/19/84	Summary Table of Contents of Title 9
	A59	4/30/84	4/16/84	Entire Index to Title 9

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A60	5/03/84	5/03/84	Complete revision of Ch. 66 (Supersedes A50)
	A61	5/03/84	4/30/84	Revisions to Ch. 1, section .103 (Superseded by A78)
	A62	12/31/84	12/28/84	Revisions to Ch. 123
	A63	5/11/84	5/9/84	Complete revision to Ch. 7 (Supersedes A47)
	A64	5/11/84	5/11/84	Revision to Ch. 64, section .400-700
	A65	5/17/84	5/17/84	Revisions to Ch. 120
	A66	5/10/84	5/8/84	Complete revision to Ch. 131
	A67	5/11/84	5/09/84	Revisions to Ch. 121, section .600
	A68	5/28/84	5/08/84	Revisions to Ch. 104
	A69	5/09/84	5/07/84	Revisions to Ch. 21, section .600
	A70	5/17/84	5/16/84	Revisions to Ch. 43, section .710
	A71	5/21/84	5/21/84	Complete revision of Ch. 20
	A72	5/25/84	5/23/84	Complete revision of Ch. 61
	A73	6/18/84	6/6/84	Complete revision of Ch. 17
	A74	6/18/84	6/7/84	Complete revision of Ch. 63 (Supersedes A49)
	A75	6/26/84	6/15/84	Complete revision of Ch. 27
	A76	6/26/84	6/15/84	Complete revision of Ch. 71
	A77	7/27/84	7/25/84	Complete revision of Ch. 6
	A78	9/10/84	8/31/84	Complete revision of Ch. 1 (Supersedes A14 and A61)
	A79	8/02/84	7/31/84	Complete revision of Ch. 18
	A80	8/03/84	8/03/84	Complete revision of Ch. 79

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A81	8/06/84	7/31/84	Revisions to Ch. 7
	A82	8/02/84	7/31/84	Revisions to Ch. 75
	A83	8/02/84	7/31/84	Revisions to Ch. 90
	A84	9/10/84	9/7/84	Complete revision of Ch. 2
	A85	7/25/84	2/17/84	Revisions to Ch. 136
	A86	8/02/84	7/31/84	Revisions to Ch. 60
	A87	11/14/84	11/09/84	Revisions to Ch. 42 (Supersedes A56)
	A88	8/31/84	8/24/84	Complete revision of Ch. 12
	A89	12/31/84	12/31/84	Complete revision of Ch. 4
	A90	10/10/84	10/01/84	Complete revision of Ch. 73
	A91	12/12/84	11/23/84	Revisions to Ch. 70
	A92	12/14/84	11/09/84	Revisions to Ch. 75
	A93	12/31/84	12/06/84	Revisions to Ch. 7
	A94	12/20/84	12/14/84	Correction to Ch. 27
	AAA9	5/14/84		Form AAA-9
	B1	3/15/85	01/31/85	Revisions to Ch. 60
	B2	3/29/85	01/31/85	Revisions to Ch. 61
	B3	3/29/85	01/31/85	Revisions to Ch. 71
	B4	6/24/85	4/01/85	Revisions to Ch. 63
	B5	6/24/85	4/04/85	Revisions to Ch. 11
	B6	6/27/85	4/01/85	Revisions to Ch. 139
	B7	6/27/85	5/01/85	Revisions to Ch. 12
	B8	7/01/85	4/01/85	Revision to Ch. 4
	B9	7/31/85	7/31/85	Revision to Ch. 130
	B11	9/27/85	7/01/85	Revision to Ch. 27 and Ch. 38

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	B12	9/27/85	7/01/85	Revision to Ch. 2
	B13	10/01/85	7/01/85	Revision to Ch. 60
	B14	11/29/85	8/01/85	Revision to Ch. 2
	B15	10/21/85	7/01/85	Revision to Ch. 75
	B16	10/22/85	7/01/85	Revision to Ch. 64
	B17	10/21/85	8/30/85	Revision to Ch. 136
	B18	10/21/85	8/01/85	Revision to Ch. 63
	B19	11/05/85	8/01/85	Revision to Ch. 133
	B20	11/01/85	8/30/85	Revision to Ch. 134
	B21	11/05/85	8/01/85	Revision to Ch. 11
	B22	11/01/85	8/01/85	Revision to Ch. 61
	B23	11/20/85	11/05/85	Revision to Ch. 71
	B24	11/20/85	11/05/85	Revision to Ch. 46
	B25	11/01/85	8/01/85	Revision to Ch. 90
	B26	11/29/85	8/01/85	Revision to Ch. 138
	B27	11/01/85	8/01/85	Revision to Ch. 48
	B28	11/29/85	8/01/85	Revision to Ch. 65
	B29	11/01/85	11/05/85	Revision to Ch. 103
	B30	11/29/85	11/05/85	Revision to Ch. 49
	B31	11/01/85	8/01/85	Revision to Ch. 7
	B32	12/01/85	8/01/85	Revision to Ch. 40
	B33	11/01/85	8/01/85	Revision to Ch. 69
	B34	02/14/86	12/31/85	Revision to Ch. 20
	B35	12/31/85	8/01/85	Revision to Ch. 132
	B36	11/29/85	8/01/85	Revision to Ch. 110

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	B37	02/12/86	11/05/85	Revision to Ch. 8
	B39	11/29/85	11/05/85	Revision to Ch. 60
	B40	02/12/86	11/05/85	Revision to Ch. 34
	B46	02/14/86	12/31/85	Revision to Ch. 42
TITLE 10	(Transmittal A2 through A7 have been superseded.)			
	A8	4/5/84	3/24/84	Complete revision of Ch. 1
	A9	4/6/84	3/20/84	Complete revision of Ch. 7
	A10	4/13/84	3/20/84	Complete revision of Ch. 5
	A11	3/29/84	3/24/84	Complete revision of Ch. 6
	A12	4/3/84	3/24/84	Complete revision of Ch. 8
	A13	9/4/84	3/26/84	Complete revision of Ch. 10
	A14	4/23/84	3/28/84	Complete revision of Ch. 4
	A15	4/17/84	3/28/84	Complete revision of Ch. 3, 9
	A16	5/4/84	3/28/84	Index and Appendix to Title 10
	A17	3/30/84	3/28/84	Summary Table of Contents to Title 10
	A18	5/4/84	4/13/84	Complete revision to Ch. 2
	A19	5/02/84	5/01/84	Revisions to Ch. 4
	A20	8/31/84	5/24/84 & 7/31/84	Revisions to Ch. 2
	A21	6/6/84	5/1/84	Corrected TOC, Ch. 4 and pages 23, 24
	A22	7/30/84	7/27/84	Revision to Ch. 2
	A23	8/02/84	7/31/84	Revision to Ch. 2
	A24	11/09/84	10/19/84	Revision to Ch. 2
	A25	11/09/84	10/19/84	Revision to Ch. 2

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 10	A26	11/28/84	11/28/84	Revision to Ch. 2
	A27	12/07/84	11/01/84	Revision to Ch. 2
	AAA10	5/14/84		Form AAA-10
	B1	3/15/85	1/31/85	Revision to Ch. 2
	B2	5/31/85	5/01/85	Revision to Ch. 2
	B3	6/27/85	4/01/85	Revision to Ch. 2
	B4	7/23/85	4/01/85	Revision to Ch. 4
	B5	02/20/86	01/27/86	Revision to Ch. 3
	B7	7/31/85	5/01/85	Revision to Ch. 2 Appendix--Form Index
	B8	11/01/85	8/16/85	Revisions to Ch. 2 and Ch. 8
	B9	11/01/85	8/16/85	Revision to Ch. 2
	B10	11/29/85	8/21/85	Revision to Ch. 2
	B11	11/29/85	8/16/85	Revision to Ch. 2
	B12	11/29/85	8/01/85	Revision to Ch. 2
	B14	11/29/85	8/01/85	Revision to Ch. 2
	B15	01/14/86	12/17/85	Revision to Ch. 2
TITLE 1-10	A1	4/25/84	4/20/84	Index to USAM

If you have any questions regarding the above, please contact Judy Beeman at FTS 673-6348.

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Editor: Judith C. Campbell FTS 673-6348

TABLE OF CONTENTS

Page
COMMENDATIONS.. 167
CLEARINGHOUSE.. 168
AFFIRMATIVE CIVIL LITIGATION... 169
POINTS TO REMEMBER
Cooperation and Immigration and Naturalization Service.................. 171
Personnel.. 171
Revision of the Procedure Available to Obtain Subpoenas................. 172
CASENOTES
OFFICE OF THE SOLICITOR GENERAL...
CIVIL DIVISION... 172
LAND AND NATURAL RESOURCES DIVISION..................................... 173
UNITED STATES ATTORNEYS' OFFICES....................................... 182
FEDERAL RULES.. 184
185
APPENDIX
Department Policy Regarding Consent Decrees and Settlement Authority
(March 13, 1986, Memorandum from Attorney General Edwin Meese III)...... 186
Cumulative List of Changing Federal Civil Postjudgment Interest Rates.... 190
List of United States Attorneys... 191

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Please send change of address to Editor, United States Attorneys' Bulletin, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

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COMMENDATIONS

The following Assistant United States Attorneys have been commended:

HARRIET LEVA BEEGUN and JON CHRISTIAN CEDERBERG (California, Central) by Mr. Richard T. Bretzing, Special Agent-in-Charge, Federal Bureau of Investigation, for their successful prosecution of a Mann Act and Dyer Act case.

CHARLES E. BROWN (Georgia, Northern) by Mr. Thomas W. Stokes, Special Agent-in-Charge, Bureau of Alcohol, Tobacco and Firearms, for his successful prosecution of firearms violations.

RICHARD A. DENNIS (Kentucky, Western) by Ms. Bettye W. Williams, District Manager, Social Security Administration, Department of Health and Human Services, for his fine job in a discrimination case.

ANITA H. DYMANT and JANET L. GOLDSTEIN (California, Central) by Mr. John N. Lewis, Supervisory Special Agent, Federal Bureau of Investigation, for their successful prosecution of an advance fee scheme case.

MYLES E. EASTWOOD (Georgia, Northern) by Mr. Richard V. Fitzgerald, Chief Counsel, Comptroller of the Currency, Administrator of National Banks, Washington, D.C., for his defense of the OCC's interests in litigation with T. Bertram Lance and the Calhoun First National Bank.

EDMOND FALGOWSKI (Delaware) by Mr. Gerald G. Doane, Manager, Corporate Security, Crown Zellerbach, for his successful prosecution of employees of Crown Zellerbach for kickbacks and bribes.

RHONDA C. FIELDS and STEPHEN R. SPIVACK (District of Columbia) by Assistant Attorney General Stephen S. Trott, Criminal Division, for their effective prosecution of a national security violations case.

BRUCE A. GREEN (New York, Southern) by Assistant Attorney General Stephen S. Trott, Criminal Division, and by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his successful conclusion of an espionage case.

BARBARA M. HARRIS (Kentucky, Western) by Mr. Fred W. Harris, Jr., Regional Attorney, Office of the General Counsel, Department of Agriculture, for her successful efforts in a Chapter 7 bankruptcy case.

DONALD C. HILL (Nevada) by Mr. Ted W. Hunter, Special Agent-in-Charge, Drug Enforcement Administration, for his successful RICO prosecution of a major chemical supplier.

EDITH S. MARSHALL and ROYCE C. LAMBERTH (District of Columbia) by Mr. Ronald E. Robertson, General Counsel, Department of Health and Human Services, for their successful efforts in homeless shelter litigation.

GALE MCKENZIE (Georgia, Northern) by Mr. William H. Webster, Director, Federal Bureau of Investigation, for her successful prosecution of a series of complex fraud by wire, mail fraud, and interstate transportation of stolen property cases involving the pharmaceutical industry.

JERE MOREHEAD (Georgia, Northern) by Assistant Attorney General Stephen S. Trott, Criminal Division, for his successful prosecution of violations of the Export Administration Act.

ALBERT R. MURRAY, JR. (Pennsylvania, Middle) by Congressman E. Clay Shaw, Jr., Florida, for his prosecution of a white collar crime case.

GEORGE L. O'CONNELL (California, Eastern) by Mr. Nolan E. Douglas, Special Agent-in-Charge, Bureau of Alcohol, Tobacco and Firearms, San Francisco, California, for his contribution to the investigation and successful prosecution of a complex arson case.

LINDA L. PARKER (Missouri, Western) by Assistant Attorney General Richard K. Willard, Civil Division, for her fine legal work in recovering approximately $7.75 million fradulently obtained from the Bureau of Indian Affairs.

CURTIS B. RAPPE (California, Central) by Mr. Richard T. Bretzing, Special Agent-in-Charge, Federal Bureau of Investigation, for his successful prosecution of a case involving wire fraud, conspiracy, Travel Act, and interstate transportation of property obtained by fraud violations.

SHARI K. SILVER (California, Central) by District Counsel L. H. Benrubi, Veterans Administration, for her outstanding victory in a murder case, and by Mr. John R. Shaw, Regional Counsel, Federal Bureau of Prisons, for her favorable settlement of a medical malpractice/wrongful death action.

F. WILLIAM SOISSON (Michigan, Eastern) by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his outstanding efforts in the investigation and trial of fradulent activities of Hamilton Medical Clinic associates.

DON J. SVET and DAVID N. WILLIAMS (New Mexico) by Mr. Richard L. Garner, Special Agent-in-Charge, Bureau of Alcohol, Tobacco and Firearms, for outstanding prosecutorial assistance in support of the Bureau's Arson Enforcement Program.

CLEARINGHOUSE

Criminal Division Interprets 18 U.S.C. §3565(h) Twenty-Year Statute of Limitation on Criminal Fines to Apply Retroactively.

The Criminal Division has issued an opinion interpreting the twenty-year Statute of Limitations provision contained in 18 U.S.C. §3565(h) to apply retroactively to fines imposed prior to the enactment of the Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-5986 (October 30, 1984). Review of the legislative history makes it evident that the purpose of enacting the Statute was to permit the Department of Justice to remove old, uncollected fines from its books so that it could more effectively allocate its fine collection resources. The retroactive application of 18 U.S.C. §3565(h) would be in keeping with the underlying purpose of the Fine Enforcement Act of 1984 which was to improve the collection of criminal fines. Accordingly, it is the opinion of the Criminal Division that Section 3565(h) of the Act authorizes the Department of Justice to close-out uncollected criminal fines that are over twenty years old.

Copies of the opinion are available upon request to the Office of Legal Services, at FTS 633-4024. Please request item number CH-31.

(Executive Office)

Personal Liability of Federal Officials - The Bivens Problem.

By memorandum of March 28, 1986, Assistant Attorney General Richard K. Willard, Civil Division, acquainted Department officials with the increase in litigation filed personally against federal officials, described in general terms the application of various immunity defenses, and provided an informational copy of a brochure on Professional Liability Insurance for Federal Employees.

If you are interested in receiving a copy of Mr. Willard's memorandum and a copy of the brochure, please contact the Office of Legal Services, at FTS 633-4024. Please request item number CH-32.

(Executive Office)

Seizure For Forfeiture--Amendments to 28 C.F.R. Parts 3, 8, and 9a, 51 Fed. Reg. 8817 (1986).

On February 27, 1986, the Attorney General reassigned the delegated responsibilities contained in Parts 3, 8, and 9a to Title 28 of the Code of Federal Regulations from the United States Marshals Service to the Federal Bureau of Investigation and revised Part 8 to include delegated authorities to the FBI under the following statutes: Copyright Act, Motor Vehicle Theft Law Enforcement Act of 1984, Child Protection Act of 1984, and statutes governing Transportation of Gambling Devices, Racketeering (Prohibition of Illegal Gambling Businesses), Prison-Made Goods, Wire Interception and Interception of Oral Communications and Foreign Wars, War Materials, and Neutrality (Illegal Exportation of War Materials). A copy of the amendments, as reported in the Federal Register, can be obtained from the Office of Legal Services, at FTS 633-4024. Please request item number CH-33.

(Executive Office)

AFFIRMATIVE CIVIL LITIGATION

Affirmative Civil Litigation; A New Section of the Bulletin.

Affirmative Civil Litigation, the aggressive attack on fraud, waste, and abuse in government expenditures, is a significant priority of the President and the Attorney General. The Attorney General's Advisory Committee of United States Attorneys appointed a subcommittee to develop strategies to respond to this problem. The Subcommittee has undertaken a thorough review of existing affirmative civil enforcement cases, provided training, developed resource materials, and has begun to develop a program to emphasize and support affirmative civil enforcement (ACE) programs in United States Attorneys' offices.

At the request of the Subcommittee, the Executive Office has added a new section to the Bulletin, which will share developments in affirmative civil litigation--that is, model complaints, the development of advocacy skills and techniques, and Department policy affecting affirmative civil litigation. Complaints will be given an identifying number which will allow them to be requested through the clearinghouse function of the Office of Legal Services.

Items submitted for publication in this section should be submitted through United States Attorney Edward S.G. Dennis, Jr., Chairman, Attorney General's Advisory Subcommittee on Affirmative Civil Litigation, Attention: James G. Sheehan, 3310 U.S. Courthouse, Independence Mall West, 601 Market Street, Philadelphia, Pennsylvania 19106.

(Executive Office)

Affirmative Civil Litigation Developments

The United States Attorney's office for the Southern District of New York recently filed ten civil complaints for damages and civil monetary penalties and forfeitures in the United States District Court. Five of the ten cases were filed under the False Claims Act, a statute which permits the United States to recover double damages and a $2,000 penalty for every false claim submitted to the government. For example, in two Medicare fraud cases the amounts the government overpaid because of fraud was approximately $50,000, the complaints seek total recoveries, including double damages and penalties, of approximately $338,000. Eight cases are related to pending or completed criminal proceedings. The ten cases are briefly described below:

United States v. $5,809,653 U.S. Currency is a civil forfeiture action regarding the seizure in a heroin case of $5,809,653.

United States v. Pimentel and Duroyd Manufacturing Co., Inc. is a False Claims Act case regarding alleged false and fraudulent cost estimates on a contract for the manufacture of artillery parts.

United States v. Sternberg and Spritzer is a False Claims Act case regarding a scheme to embezzle Medicaid funds by issuing, forging, and laundering false and fraudulent checks.

United States v. Eng Kock Tan and Livingston is a False Claims Act case brought against two doctors convicted of Medicare fraud for services not rendered and converting funds.

United States v. Diamond is a False Claims Act case brought against a doctor convicted of Medicare fraud for services not performed, double billing, and falsely describing services to inflate fees.

United States v. Young is a False Claims Act case brought against a couple for underreporting their incomes and making other false statements to qualify for rent subsidized housing.

United States v. Perlmutter is a suit brought against a former Assistant United States Attorney to recover cash and the value of drugs stolen from the United States Attorney's office.

United States v. Rivas and A/Del Lithographics, Inc. is a suit to recover overpayments on Government Printing Office contracts awarded by a former government employee who accepted illegal gratuities from the contractor.

United States v. Krieger is a commercial case to recover the unpaid amounts of two government loans which defendants guaranteed.

United States v. Stanley Russo and Sons is a suit against a fruit and vegetable wholesaler, its owners and employees for civil penalties for violations of federal law prohibiting the "lumping" practice of falsely charging "unloading" fees.

Assistant United States Attorneys can obtain copies of all or any one of the above complaints by contacting the Office of Legal Services at FTS 633-4024. Please request CH-ACE/1 plus the name of the complaint(s) you desire.

(Executive Office)

POINTS TO REMEMBER

Cooperation With Immigration and Naturalization Service.

The Immigration and Naturalization Service (INS) recently encountered difficulty in deporting aliens paroled into the United States for prosecution or to act as witnesses for the government, because the aliens' passports were lost or misfiled during related judicial proceedings and/or terms of imprisonment. The INS requests the assistance of United States Attorneys' offices and the Drug Enforcement Administration in securing alien passports, identity cards, or other documentation as come into their possession, and requests such documents be sent immediately to the District Director of the nearest INS Office.

Offices heavily engaged in drug-related prosecutions, involving aliens paroled into the United States, may need to establish internal procedures for sending passports and other evidence of nationality to the INS which will facilitate speedy deportation or exclusion proceedings.

(Executive Office)

Personnel.

On March 28, 1986, Robert Q. Whitwell was sworn in as the Presidentially-appointed United States Attorney for the Northern District of Mississippi.

On April 4, 1986, Henry K. Oncken was sworn in as the Presidentially-appointed United States Attorney for the Southern District of Texas.

(Executive Office)

Revision of the Procedures Available to obtain subpoenas.

Appended to this Bulletin is a March 11, 1986, letter from Assistant Attorney General Stephen S. Trott, Criminal Division, to Mr. Howard Safir, Assistant Director for Operations, United States Marshals Service, on the above subject. The letter advises the Marshals Service that "in cases where the United States Parole Commission has issued a warrant for the apprehension of a parole absconder and the Marshals Service decides that its search for the absconder would be aided by the issuance of a subpoena for records, the official in charge of the investigation should (1) ascertain from the face of the Parole Commission's warrant which United States District Court imposed the sentence; and (2) request an Assistant United States Attorney in that district to file a motion (under the caption of the original criminal proceeding in which the sentence was imposed) which requests the issuance of a subpoena to aid the Marshals Service in locating the defendant to enforce the parole violator administrative warrant."

(Parole Commission)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A brief amicus curiae in Cerbone v. Conway, 758 F.2d 46 (2d Cir. 1985). The question is whether a two year delay in dismissing criminal charges for issuing a bad check constitutes a deprivation of liberty under the due process clause.

A brief amicus curiae in North Carolina Department of Transportation v. Crest Street Community Council, 769 F.2d 1025 (4th Cir. 1985). The issue is whether local community organizations are entitled to attorney fees under 42 U.S.C. §1988 as prevailing parties in a Title VI action.

A brief amicus curiae in Colorado v. Connelly, 702 P.2d 722 (Colo. 1985). The questions are (1) whether the due process clause requires suppression of a confession by a suspect who believed that God told him to confess; and (2) whether the suspect's mental condition rendered his waiver of his Miranda rights ineffective.

A petition for certiorari in Block v. Iowa, 771 F.2d 347 (8th Cir. 1985). The question presented is whether the Secretary of Agriculture has implementation discretion under the Special Disaster Payment Program, 7 U.S.C. §1444d(b)(2)(D).

A petition for certiorari in NLRB v. International Brotherhood of Electrical Workers, 780 F.2d 1489 (9th Cir. 1986). The issue is whether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members for working for an employer that does not have a collective bargaining agreement with that union.

A petition for certiorari in United States v. Merchant, 760 F.2d 963 (9th Cir. 1985). The questions presented are (1) whether failure to provide the defendant with personal notice of a state court "probation reinstatement" hearing constituted a denial of due process; and (2) whether law enforcement officers reasonably relied on a state court order imposing a probation condition that gave them the right to search defendant's home without a warrant.

A petition for certiorari in United States v. Cherokee Nation of Oklahoma, 782 F.2d 871 (10th Cir. 1986). The question presented is whether the United States' navigational servitude bars the Cherokee Nation's claim that construction of the McClellan-Kerr Arkansas River Navigation Project has resulted in a compensable taking of tribal interests in the underlying riverbed.

A petition for certiorari in Johnson v. United States, 779 F.2d 1492 (11th Cir. 1986). The issue is whether a claim may be brought against the United States based on the alleged negligence of FAA air traffic controllers that resulted in the death of a serviceman incident to his military service.

A jurisdictional statement in Roadway Express v. Brock, 624 F. Supp. 197 (N.D. Ga. 1985). The question presented is whether Section 405(c) of the Surface Transportation Act of 1982, 49 U.S.C. App. §2305(c), is invalid under the Due Process Clause of the Fifth Amendment.

CIVIL DIVISION

SUPREME COURT HOLDS THAT FIRST AMENDMENT DOES NOT REQUIRE MILITARY TO MAKE EXCEPTIONS TO UNIFORM DRESS REQUIREMENTS FOR MILITARY PERSONNEL WHO WISH TO WEAR RELIGIOUS APPAREL WHILE ON DUTY.

Air Force regulations prescribe exactly all of the various clothing articles that are to be worn by military personnel during their various duty assignments. The plaintiff, an Orthodox Jew and a psychologist, had joined the Air Force as an officer, and was assigned duties primarily in a base hospital. In accordance with his religious upbringing, the plaintiff had worn a skull cap or yarmulke as a civilian, and sought to continue this practice while on military duty. The wearing of a yarmulke is not permitted by the Air Force dress regulations, and plaintiff was directed to conform his dress to military standards. The plaintiff brought suit claiming that the Air Force's uniform regulations infringed upon his right to freely practice his religion, and he was constitutionally entitled to be exempt from the uniform regulations.

The Supreme Court has upheld the validity of the uniform regulation. The Court reiterated and enlarged upon the relaxed standard of judicial review appropriate in challenges to military regulations; the majority noted that review of military regulations "is far more deferential than constitutional review of similar laws or regulations designed for civilian society." Slip op. 4. And in determining "whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." The Court acknowledged that "the essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" And it deferred to the professional judgment of the Air Force that the traditional outfitting of personnel in standardized uniforms serves this goal. The Court held that although the wearing of a yarmulke may well be "a form of silent devotion akin to prayer[,] . . . the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations."

Goldman v. Weinberger, ___U.S.___, No. 84-1097 (Mar. 25, 1986). D. J. #35-16-1788. Attorneys: Anthony J. Steinmeyer (FTS 633-3388) Alfred R. Mollin (FTS 633-4116), Civil Division.

FEDERAL CIRCUIT HOLDS SAILOR MUST EXHAUST MILITARY REMEDIES BEFORE PRESENTING DUE PROCESS CHALLENGE TO HIS MARIJUANA COURT MARTIAL CONVICTION BASED UPON URINALYSIS TEST.

As part of its program to combat drug abuse, the military services have authorized "unit sweep" urinalysis testing of entire units. Williams tested positive for marijuana when his unit was tested. As a result, he was convicted at a special court martial, and he was given a general discharge. Instead of pursuing his right to appeal the conviction, Williams brought a class action in the Eastern District of Virginia broadly challenging the constitutionality of the urinalysis program. The district court denied the government's motion to dismiss and held a trial. Williams, however, presented no evidence, and the district court entered judgment on the merits for the government. Williams then appealed to the Fourth Circuit. On the government's motion, the Fourth Circuit transferred the appeal to the Federal Circuit.

The Federal Circuit held that the district court should have dismissed the case for failure to exhaust. The court held that the district court erred by entertaining the broad constitutional challenges to the military's urinalysis testing program before Williams had presented all his claims--constitutional, statutory, evidentiary, and factual--to the military system for reviewing court martials. Declining to follow a Ninth Circuit precedent to the contrary, the Federal Circuit stated, "If the rush to the federal courthouse, bypassing the congressionally created system attempted here by Williams, were permissible, Congress would be well advised to dismantle the military justice system as no longer required."

Williams v. Secretary of the Navy, ___F.2d___, No. 85-2690 (Fed. Cir. Mar. 18, 1986). D. J. #145-6-2562. Attorneys: Anthony J. Steinmeyer (FTS 633-3388), Civil Division, and Jay S. Bybee (633-3274), Office of Legal Policy).

SECOND CIRCUIT AFFIRMS DISTRICT COURT'S ORDER GRANTING NEW YORK CITY A STAY FOR ONE YEAR OF ITS JUDGMENT, ISSUED ON REMAND FROM THE SUPREME COURT'S DECISION IN AGUILAR v. FELTON, WHICH DECLARED UNCONSTITUTIONAL THE DELIVERY OF CHAPTER ONE SERVICES IN SECTARIAN SCHOOLS.

Plaintiffs had challenged as unconstitutional the provision of Chapter 1 (of the Education Consolidation and Improvement Act of 1981) services in sectarian schools. Plaintiffs lost in the district court, but won a reversal in the Second Circuit which was later upheld by the Supreme Court. In its original decision, the Second Circuit, in finding the program unconstitutional to the extent that services were provided in sectarian schools, had stated that "[t]he district court should afford sufficient time for the City to propose and the Secretary [of Education] to approve an alternative plan." The Supreme Court did not disturb this aspect of the Second Circuit's decision. When the case was eventually remanded to the district court, the City and the Secretary sought a stay of the injunction for one school year. The district court granted the stay over the plaintiffs' objection. Plaintiffs then appealed.

The Second Circuit affirmed the district court's stay of judgment. The court of appeals determined that granting the stay was not an abuse of discretion, citing its own statement (in its original opinion), and the record which shows that New York's Chapter 1 program is the largest in the country. The court, however, indicated very clearly that it expected a new proposal to be in position to implement at the start of the 1986 school year.

Felton v. Secretary of Education, ____ F.2d ____, No. 85-6399 (2d Cir. Mar. 26, 1986). D. J. #145-16-1482. Attorneys: Michael Singer (FTS 633-3518) and Howard Scher (FTS 633-4820), Civil Division.

SECOND CIRCUIT AFFIRMS AMENDED CLASS CERTIFICATION ORDER UNDER THE 1984 REFORM ACT, REQUIRES THE SECRETARY TO DISTRIBUTE TO ALL ADMINISTRATIVE ADJUDICATORS INSTRUCTIONS REGARDING THE "TREATING PHYSICIAN RULE," AND ADOPTS ALL THE PLAINTIFFS' CLAIMS REGARDING THE APPROPRIATE NOTICE SENT TO CLASS MEMBERS PURSUANT TO THE 1984 REFORM ACT.

In this social security class action, the court of appeals first held that the class members whose benefits were terminated between June 1, 1976, and October 8, 1984, were entitled to the 1984 Reform Act's statutory remand and readjudication. The court of appeals rejected the Secretary's contention that the district court's amended class certification violated section 2(d)(3)(B) of the Reform Act. Secondly, while the court believed the Secretary's contention that his "treating physician" rule and the Second Circuit's were the same, it nonetheless ordered the Secretary to distribute instructions in all relevant publications to all administrative adjudicators regarding the weight to be accorded to the treating physician's opinion. Such instructions were necessary, the court ruled, because of the extraordinary number of court decisions, reversing the Secretary's decisions on the basis of the "treating physician rule." Finally, the Second Circuit agreed with all the plaintiffs' claims on the appropriate notice to be sent to class members pursuant to the Reform Act and on the appropriate mailing procedures for these notices.

Schisler v. Heckler, ___ F.2d ___, Nos. 85-6092 & 6096 (2d. Cir. Apr. 2, 1986). D. J. #181-53-III. Attorneys: William Kanter (FTS 633-1597) and Frank Rosenfeld (FTS 633-4052), Civil Division.

THIRD CIRCUIT HOLDS THAT THE COMPTROLLER GENERAL'S EXERCISE OF EXECUTIVE AUTHORITY UNDER THE COMPETITION IN CONTRACTING ACT IS CONSISTENT WITH SEPARATION OF POWERS DOCTRINE.

The Competition in Contracting Act of 1984 (CICA) provides, inter alia, that once an unsuccessful bidder files a timely protest with the Comptroller General, the contracting agency may not award the challenged contract, and must suspend performance on a contract already awarded pending a nonbinding decision on the protest by the Comptroller General. In signing the Act into law, the President stated that these provisions violate separation of powers principles by giving the Comptroller General, an arm of Congress, power that cannot be exercised by Legislative Branch officers. Based upon the Attorney General's determination that the constitutionally offensive features could not be severed from the remainder of the stay provisions, Executive Branch agencies were directed to proceed as if the stay provisions were not included in the Act.

Ameron, Inc., an unsuccessful bidder on an Army Corps of Engineers contract, brought suit seeking to compel the agency to cease contract performance pending a decision by the Comptroller General on its protest. The district court rejected the government's constitutional challenge, and held that Ameron was statutorily entitled to a stay of further performance on the contract until the Comptroller General ruled on the protest.

The court of appeals affirmed. In the court's view, the Comptroller General is a part of the headless "fourth branch" of government "consisting of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either." The Comptroller General may therefore discharge the stay lifting functions prescribed in the Act. In concurrence, Judge Becker disagreed that there is a fourth branch of government. His reading of the legislative history convinced him that the Comptroller General was part of the legislative branch. Nonetheless, he concluded that the Comptroller General could exercise the functions assigned to him in the Act because his involvement would not pose a threat to the proper balance of powers among the branches.

Ameron, Inc. v. United States Army Corps of Engineers, ___ F.2d ___, Nos. 85-5226 & 5377 (3d. Cir. Mar. 27, 1986). D. J. #145-4-4508. Attorneys: William Kanter (FTS 633-1597) and Harold J. Krent (FTS 633-3159), Civil Division.

THIRD CIRCUIT AFFIRMS DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' ACTION SEEKING TO DECLARE UNCONSTITUTIONAL UNITED STATES DIPLOMATIC RECOGNITION OF THE VATICAN.

Plaintiffs sued the President, Secretary of State, and the United States Ambassador to the Vatican, claiming that congressional action consenting to the appointment of and funding for a diplomatic mission to the Vatican violates the

First Amendment, and that the President's action in extending diplomatic recognition to the Vatican exceeds the President's Article II powers and violates the First and Fifth Amendments. The district court dismissed the suit for lack of standing and non-justiciable controversy.

The Third Circuit unanimously affirmed on both grounds. The court of appeals held taxpayer standing inapplicable under Flast v. Cohen; that citizen standing did not support the suit; and that plaintiffs had failed to allege particularized harm as nonCatholic victims of stigmatization under Valley Forge. Alternatively, the court of appeals held that the Constitution commits to the President alone all decisions on the establishment of diplomatic relations; therefore, the suit is nonjusticiable under Baker v. Carr. The court of appeals noted that because the Vatican is in the unique position of a Church controlling a sovereign territory, the case did not present any issue of establishing diplomatic relations with a church *qua* church.

Americans United for Separation of Church and State v. Reagan, ___F.2d ___, (3d Cir. Mar. 21, 1986). D. J. #145-1-1090. Attorneys: James M. Spears (FTS 633-3301), Nicholas S. Zeppos (FTS 633-5431), and Paul Blankenstein (former Appellate Staff employee), Civil Division).

FOURTH CIRCUIT REVERSES PRELIMINARY INJUNCTION THAT RESTRAINED NAVY FROM SUSPENDING A CONTRACTOR WHO IS UNDER INDICTMENT FOR FRAUD.

Merritt, a heating and air conditioning contractor, was indicted on two counts of fraud relating to its government contracts. Pursuant to the Federal Acquisition Regulations, the Navy suspended Merritt from future contracting with any executive branch agency. The suspension did not affect Merritt's existing government contracts. The district court acknowledged Merritt's argument that due process requires a hearing before suspension, and it enjoined the pending suspension against Merritt.

The government appealed, and moved for summary reversal because the imminence of Merritt's criminal trial created a serious threat that the action would become moot before the court of appeals could review the case. The Fourth Circuit promptly set our motion for oral argument, and reversed the preliminary injunction.

Merritt and Sons v. Marsh, ____F.2d___, No. 86-3830, (4th Cir. Apr. 8, 1986). D. J. #78-67-43. Attorneys: Anthony J. Steinmeyer (FTS 633-3388) and Freddi Lipstein (FTS 633-3542), Civil Division.

FOURTH CIRCUIT HOLDS THAT PLAINTIFFS' ALLEGATION OF NEGLIGENT MISGRADING OF COTTON BY DEPARTMENT OF AGRICULTURE IS BARRED AS FALLING WITHIN THE MISREPRESENTATION EXCEPTION OF THE FTCA.

Under the Federal Tort Claims Act, a claim is barred if it arises out of "misrepresentation." In 1961, the Supreme Court interpreted this exception, holding that if the gist of the tort sounds in misrepresentation, the claim is barred even if plaintiff alleges negligence in the ascertainment of the information underlying the communication to plaintiff. United States v. Neustadt, 366

U.S. 696 (1961). In 1983, the Supreme Court again interpreted the misrepresentation exception in Block v. Neal, 460 U.S. 289 (1983). In Neal, the Court held that under the facts of that case, the plaintiff had successfully alleged a separate tort of negligence which would not be barred by the misrepresentation exception, despite its partial overlap with a negligent misrepresentation claim. Since Neal, courts increasingly have been willing to find the "separate" negligence claim, in some cases intimating that Neustadt is now confined to its facts.

Plaintiffs alleged the Department of Agriculture negligently overgraded certain cotton, which they bought at the erroneous price. Plaintiffs alleged they lost $3 million when the cotton could not be sold at the graded price. The district court dismissed the case based on the government's argument that plaintiffs' claim is a classic case of negligent misrepresentation under Neustadt. Plaintiffs, on appeal, argued that they stated a separate tort within the Neal doctrine. The Fourth Circuit, however, held that plaintiffs did not state a "separate" tort. Accordingly, the Fourth Circuit is the first appellate court since Neal to squarely hold that Neustadt controls the facts before it.

Carolinas Cotton Growers Ass'n v. United States, ___ F.2d ___, No. 85-1382 (4th Cir. Feb. 27, 1986). D. J. #157-54-410. Attorneys: Robert S. Greenspan (FTS 633-5429) and Barbara C. Biddle (FTS 633-4214), Civil Division.

SIXTH CIRCUIT HOLDS THAT JUDGMENT AGAINST UNITED STATES UNDER THE FTCA BARS BIVENS ACTION AGAINST INDIVIDUAL GOVERNMENT EMPLOYEE BY REASON OF THE SAME SUBJECT MATTER.

Plaintiff, a prisoner incarcerated in a federal prison, brought actions against the United States, a prison warden, and a prison doctor based upon allegations of negligence and deliberate indifference to plaintiff's medical needs that resulted in premature loss of his right leg due to atherosclerosis. The United States stipulated liability on plaintiff's FTCA claim. Although plaintiff's action against the warden was dismissed, plaintiff obtained a judgment against the prison doctor for $15,000 in punitive damages based on a Bivens action for violation of his Eighth Amendment right against cruel and unusual punishment. In the district court, the United States Attorney, who represented both the government and the individuals, contended that entry of judgment against the United States on plaintiff's FTCA claim barred plaintiff's actions against the individual defendants. The district court rejected that position and entered judgment against the United States on the FTCA claim and against the prison doctor on the Bivens claim.

The Sixth Circuit reversed and remanded for entry of judgment in favor of the prison doctor. The court held that the FTCA's language "that a judgment shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the government employee whose conduct gave rise to the claim" bars claims based on different legal theories but arising from the same actions that formed the grounds for judgment against the United States.

Serra v. Pichardo, ___ F.2d ___, Nos. 84-6103 & 6122 (6th Cir. Mar. 24, 1986). D. J. #157-30-314. Attorneys: Barbara L. Herwig (FTS 633-5425) and Peter R. Maier (FTS 633-4052), Civil Division.

SEVENTH CIRCUIT UPHOLDS HHS MEDICAID REGULATION REGARDING MAINTENANCE ALLOWANCES FOR SPOUSES.

This suit was brought by two Indiana couples. In both cases, the family's income consisted of the husband's retirement pension, and the husband was confined in a nursing home while the wife remained at home. For the husband to be eligible for Medicaid assistance, an HHS regulation required that all of the husband's pension be paid to the nursing home except for monthly allowances of $28.50 for the husband and an allowance for the wife that could not exceed the amount that a single person could receive and still be eligible for Medicaid. Indiana set that level at $238 per month. Plaintiffs contrasted their situations with those of couples where the dependent spouse was institutionalized and the spouse with independent income remained at home. In those cases, while part of the non-instutionalized spouse's income is "deemed" available to pay the institutionalized spouse's medical costs, the family unit retains substantially more of its income to meet the needs of the non-institutionalized spouse--$577 per month rather than $238. Moreover, if the non-institutionalized spouse can show actual needs in excess of $577 per month, the full actual needs amount can be retained. Noting that $238 is below the poverty level and that, unlike the "deeming" situation, there is no provision to allow the spouse to demonstrate actual needs in excess of the $238, plaintiffs argued that the $238 flat rate set by Indiana violated the federal Medicaid statute and denied due process.

The Seventh Circuit affirmed the district court's decision upholding HHS's regulation and Indiana's implementation of it. After noting its limited scope of review of HHS's legislative rule, the court of appeals held that the strict limit on the spousal maintenance allowance insured that the limited Medicaid funds went to the most needy individuals. The court also held that the plaintiffs' situation was properly distinguished from the "deeming" cases. For plaintiffs, the issue was how much of a person's income must go for his own medical care, while in the deeming cases, the issue was how much of a person's income must go to meet the medical needs of his spouse.

Mattingly v. Heckler, ___ F.2d ___, No. 85-1205 (7th Cir. Feb. 21, 1986). D. J. #137-26S-447. Attorneys: Anthony J. Steinmeyer (FTS 633-3388), Civil Division, and Daniel E. Bensing (633-3886), Legislative Affairs.

EIGHTH CIRCUIT REVERSES DISTRICT COURT HOLDING THAT ARMY VIOLATED PRIVACY ACT BY EXAMINING AGENCY RECORDS IN ORDER TO RESPOND TO AN EMPLOYEE'S DISCRIMINATION COMPLAINT.

Plaintiff, a civilian employee, filed a discrimination complaint against the Army. The complaint was investigated by the Army's EEO office. But when the report was received, plaintiff's commander determined that it was incomplete, and, therefore, ordered his subordinates to examine agency records in order to respond to the complaint and the report. Plaintiff then filed a Privacy Act suit, claiming that this counter-investigation into her files and the consequent disclosure of records to her commander and his subordinates was not within any statutory exception authorizing disclosure. The district court agreed, holding that the counter-investigation violated EEOC regulations that vest investigation authority in the Army EEO office, and that the disclosures therefore violated the Privacy Act.

The court of appeals reversed, holding that it was proper for the base commander to conduct the counter-investigation. "EEOC regulations do not prevent the Army from consulting its own personnel files or other records pertaining to a claim of employment discrimination." Accordingly, the court of appeals held that the disclosures fell within Exception (b)(1), i.e., disclosure to agency employees who have a need for the record in the performance of their duties.

Howard v. Marsh, ___F.2d___, No. 84-2498 (8th Cir. Mar. 12, 1986). D. J. # 157-42-486. Attorneys: Leonard Schaitman (FTS 633-3441) and Marc Richman (FTS 633-5735), Civil Division.

EIGHTH CIRCUIT UPHOLDS HHS' IMPLEMENTATION OF THE SSI WINDFALL OFFSET STATUTE AGAINST STATUTORY AND APA CHALLENGES.

In 1980, Congress added a provision to the Social Security Act which required the Secretary of HHS to reduce retroactive Title II benefits to individuals who were paid Supplemental Security Income (SSI) benefits for the same period. The intention was to prevent windfalls or duplication in benefit payments under the Title II and SSI programs. As provided in the Social Security program operations manual, the Secretary implemented the statutory offset provisions not only in cases where the SSI had been paid in the past, but also where concurrent applications for Title II and SSI benefits were processed, with retroactive benefits eventually accruing under both programs.

Plaintiff brought this class action challenging the agency's practice of reducing Title II retroactive benefits in concurrent application cases. Plaintiff argued that such a reduction was not authorized by the offset statute, or in any event should have been promulgated under APA notice and comment rule-making procedures. Plaintiff also argued that where the Secretary paid the SSI retroactive benefits to the State welfare agency in reimbursement of interim State benefits, and then reduced the retroactive Title II award by the SSI windfall amount, the Secretary's action violated the anti-alienation provision in the Social Security Act (barring use of Title II benefits for satisfaction of creditor claims). Shortly following the effective date of a 1984 amendment to the offset statute, the district court ruled for plaintiff and her class on all counts, and enjoined the Secretary from reducing Title II benefits in the case of the class members.

The Eighth Circuit reversed. It held that the original and amended offset statutes authorized and contemplated that the Secretary would reduce retroactive Title II benefits by the excessive SSI benefits paid, in order to prevent windfalls. The court of appeals further held that reimbursement of States for interim assistance from retroactive SSI benefits, coupled with reduction of retroactive Title II benefits, did not violate the anti-alienation provision for Title II benefits. Finally, the court of appeals held that the program manual provisions were interpretations of the windfall offset statute which were exempt from APA notice and comment procedures, and were not required to be published in the Federal Register.

McKenzie v. Bowen, Secretary of Health and Human Services, ___F.2d___, No. 85-5103 (8th Cir. Mar. 28, 1986). D. J. #137-39-951. Attorneys: William Kanter (FTS 633-1597) and Michael Kimmel (FTS 633-5714), Civil Division.

NINTH CIRCUIT HOLDS THAT CHALLENGE TO NATIONAL TRANSPORTATION BOARD'S METHOD OF INVESTIGATING AIRCRAFT ACCIDENTS IS PRECLUDED FROM JUDICIAL REVIEW.

Petitioners sought review of a decision of the National Transportation Safety Board (NTSB), declining petitioners' request to convene a special board of inquiry under 49 U.S.C. §1443. Petitioners argued that a special board of inquiry, much like the Presidential Commission now investigating the Challenger disaster, was needed to "clear the air" over a series of accidents caused by the accumulation of water in the fuel lines of single-engine aircraft. The NTSB investigated the accidents on its own, and made various safety recommendations to the Federal Aviation Administration, some of which were accepted. The Board declined to launch an additional inquiry under the provisions of 49 U.S.C. §1443, both in light of the duplication of resources that would result and of the lack of any extraordinary need for such a high level commission. The court of appeals has just accepted the government's argument that the Board's decision as to how to discharge its statutory responsbility to investigate accidents--whether on its own or by convening a special board of inquiry--is precluded from judicial review. The court concluded that because "nothing in the statute . . . compels the National Transportation Board to convene a board of inquiry at the behest of a private citizen, we believe that the method of inquiry is a matter committed to the agency's discretion."

Kuchar v. NTSB, ___F.2d___, No. 85-7184 (9th Cir. Mar. 25, 1986). D. J. #80094-99. Attorneys: Robert S. Greenspan (FTS 633-5428) and Harold J. Krent (FTS 633-3159), Civil Division.

ELEVENTH CIRCUIT HOLDS THAT FAILURE OF BORDER OFFICIALS TO INFORM FOREIGN-BORN CITIZEN OF RESIDENCY REQUIREMENTS FOR RETENTION OF CITIZENSHIP DOES NOT ESTOP THE GOVERNMENT FROM DENYING CERTIFICATE OF CITIZENSHIP.

Plaintiff Camille Paul is the Canadian-born son of an American citizen mother. Under provisions of the Immigration and Nationality Act, he was a citizen at birth. But Section 301(b) of the Act required that he reside in the United States for a continuous period of at least two years between the ages of 14 and 28 in order to retain his citizenship. Paul failed to meet this requirement and, when he subsequently sought a certificate of citizenship from the INS, it was denied.

Paul then sought a declaration of citizenship in the district court, contending that the government was estopped from denying him the certificate because on the many occasions when he crossed the border from Canada, always asserting to border officials that he was an American citizen, they had never informed him of the residency requirement. He also contended that Section 301(b) as applied in his case violated his rights to due process and equal protection because, after his citizenship rights had already lapsed under the statute, Congress repealed the residency requirement but gave the repeal only prospective effect.

The district court held that the conduct of the border officials was sufficient to estop the government. The court declined to reach Paul's constitutional claim. The court of appeals reversed, holding that border officials had no duty to inform Paul of the residency requirement. The court remanded the case to the district court for consideration of the constitutional claim.

Paul v. Meese, ___F.2d___, No. 85-1496 (11th Cir. Feb. 27, 1986). D. J. #39-78-60. Attorneys: Barbara L. Herwig (FTS 633-5425) and Irene M. Solet (FTS 633-3355), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

FEDERAL GOVERNMENT NOT BARRED FROM PRESENTING TRIBAL WATER CLAIMS IN ARIZONA COURT.

The Tribe denied jurisdiction of the Arizona court W-1 over its water rights, and alleged that the government, or its officials, had committed fraud by grossly understating the Tribe's legitimate water claim and had mismanaged the Tribe's valuable water resources through its participation in W-1. The court of appeals affirmed the summary judgment and permanent injunction against the Tribe, preventing the Tribe--through its Tribal Court or otherwise--from interfering with officers, contractors or other representatives of the United States in the performance of their official duties, on or off the reservation, which relate in any way to the preparation and filing of water rights claims in W-1. The Tribe had forbidden our contractor's entry on the reservation to do studies necessary for development of tribal water claims, and the Tribal Court had enjoined Interior officials from transmitting any claims-related materials or documents to the Department of Justice for filing in W-1. The court of appeals held that the Tribe had "neither the jurisdiction nor the right to interfere with the official conduct of federal business by federal agents or employees . . ." The government has, as trustee, the "affirmative obligation to assert water claims" for the Tribe; and the Tribe lacks any authority to interfere with federal efforts to perform that duty, "regardless of the merits of the Tribe's charges that the officials were conducting their official business improperly." Nor was the United States required to exhaust its remedies in Tribal Court because sovereign immunity "clearly foreclosed" tribal jurisdiction.

United States v. White Mountain Apache Tribe, ___F2d___, No. 85-1719 (9th Cir. Mar. 7, 1986). D. J. #90-2-4-788. Attorneys: Martin W. Matzen (FTS 633-4426) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

CATEGORICAL EXCLUSION FROM EIS FOR WEST HOUSTON AIRPORT UPHELD.

The Fifth Circuit affirmed a decision by the Federal Aviation Administration (FAA) that the grant of an Airport Operating Certificate to West Houston Airport was categorically excluded from preparation of an environmental assessment (EA) under NEPA. Petitioner contended that the opposition of some 60 percent of a neighborhood in the direct vicinity of the airport rendered the project "highly controversial," which under FAA regulations would trigger the EA requirement for projects otherwise categorically excluded. The court held that there must be a "substantial number" of persons in opposition "in the relevant project service area." Courts should defer to an agency's interpretation of its categorical exclusion regulations, and the FAA was not "plainly erroneous" in concluding that this action was not highly controversial.

> West Houston Air Committee v. Federal Aviation Administration, ___ F.2d ___, Nos. 85-4099, 4123 (5th Cir. Mar. 12, 1986). D. J. #90-1-4-2856. Attorneys: John T. Stahr (FTS 633-2956), Jacques B. Gelin (FTS 633-2762), and Peter R. Steenland, Jr. (FTS 633-2748), Land and Natural Resources Division.

REGULATORY FINES UNDER MAGNUSON ACT SUSTAINED.

A New Jersey dockowner, was found to have violated regulations issued pursuant to the Magnuson Act when, by physical obstruction and unbecoming language, he prevented a National Marine Fisheries Service agent from inspecting fish that were being unloaded. The court of appeals, interpreting the Magnuson Act broadly, upheld the regulatory fines. The Act itself only expressly authorizes inspections of vessels; it is the regulation that extends this authority to "areas of custody." The court, however, found that the Secretary was well within his broad regulatory authority in determining that inspection of dock areas is necessary to implement the Act. The court rejected the Fourth Amendment warrantless search objection on the ground that the commercial fishing industry is "pervasively regulated" and the measures taken are reasonable in light of the strong federal interests at stake. The court also stressed that, because of the highly perishable nature of fish, it would be difficult to obtain warrants in advance, especially since the purpose of the inspections is frequently to gather information, not seek out wrongdoers.

> Lovgren v. Byrne, ___ F.2d ___, No. 85-5180 (3d Cir. Mar. 26, 1986). D. J. #90-8-8-97. Attorneys: Blake A. Watson (FTS 633-2772) and Jacques B. Gelin (FTS 633-2762), Land and Natural Resources Division.

MOTION TO DISSOLVE INJUNCTION DENIED, AND DOUBLE COSTS UNDER FEDERAL RULES OF APPELLATE PROCEDURE 38 ASSESSED.

Woodbridge Township appealed from an interlocutory order denying its motion to dissolve an injunction which had directed Woodbridge to comply with the Clean Water Act and NPDES permits in discharging its sewage into navigable waterways. Woodbridge asserted both in initially opposing the injunction and in moving to dissolve that its compliance was contingent upon receipt of EPA grant funds.

The court of appeals held that its scope of review is limited to considering whether the district court abused its discretion in denying the motion to dissolve; and the standard of the district court is whether the movant has demonstrated changed circumstances warranting discontinance of the order. The court found that Woodbridge made no showing of changed circumstances, and assessed double costs under Federal Rules of Appellate Procedure 38 for bringing a frivolous appeal. The court in dicta also found the language and legislative history of the Clean Water Act "require the inescapable conclusion that a municipality's obligation . . . is not contingent upon its receipt of federal funds."

Township of Franklin Sewerage Authority v. Middlesex County Utilities Authority, ___ F.2d ___, No. 85-5493 (3d Cir. Mar. 28, 1986). D. J. #90-5-1-6-345. Attorneys: John T. Stahr (FTS 633-2956) and Dirk D. Snel (FTS 633-4400), Land and Natural Resources Division.

UNITED STATES ATTORNEYS' OFFICES

OHIO, NORTHERN

DISTRICT COURT HOLDS THAT INCREASED RISK OF CONTRACTING GUILLAIN-BARRE SYNDROME (GBS) LASTS FOR A MAXIMUM OF EIGHT WEEKS FOLLOWING SWINE FLU INOCULATION.

Plaintiff, who developed a severe case of Guillain-Barre syndrome (GBS) approximately nine and one-half weeks after receiving a swine flu shot, brought tort action against the United States. The United States argued that the increased risk of contracting GBS lasted for a maximum of eight weeks from the date of inoculation, and the district court agreed. Relying on an epidemiological study commissioned by the Department of Justice and published in the American Journal of Epidemiology in 1984, as well as testimony from two of the five experts who authored that study, the district court held: "The data establishes that after the expiration of that eight week period, a vaccinated individual was at no greater risk of contracting GBS than was any member of the general population; *i.e.*, after the expiration of eight weeks there is no data with which to prove a contention that the swine flu inoculation was a likely cause of an individual's GBS." This is the first court decision to hold expressly that the increased risk of contracting GBS lasted for fewer than ten weeks from the date of the swine flu shot.

Benedict v. United States, ___ F. Supp. ___, No. C78-529 (N.D. Ohio, Apr. 2, 1986). D. J. #192-57-5. Attorneys: Patrick M. McLaughlin, United States Attorney (FTS 293-3901), and Arthur I. Harris, Assistant United States Attorney (FTS 293-3950), Ohio, Northern.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8 (b). Joinder of Offenses and of Defendants. Joinder of Defendants.

A father and son were convicted of, inter alia, mail fraud in connection with insurance claims for fire damage to a restaurant, a duplex, and a third building. The restaurant was operated by the father in partnership with others. Count 1 charged the father with mail fraud with regard to that fire. The duplex was owned by a different partnership, of which the son was one of the partners. Counts 2 through 4 charged both defendants with mail fraud related to the duplex fire. Count 5 charged both defendants with conspiracy to commit mail fraud in connection with the third arson scheme, and count 6 charged the son with perjury before the grand jury. The district court denied defendants' pretrial motions for severance on the ground that the charged offenses were misjoined in violation of Rule 8(b). When evidence relating to the restaurant fire was admitted, the court instructed the jury not to consider the evidence against the son, and repeated this instruction in the final charge and admonished the jury to consider each count and defendants separately. The jury returned convictions on all counts. The defendants appealed and the court of appeals reversed and remanded for new trials, holding that the joinder of count 1 with the other five counts violated Rule 8(b) and that such misjoinder was prejudicial per se. The government filed a petition for rehearing and this was denied. The Supreme Court granted certiorari.

The Supreme Court held that the misjoinder of defendants in violation of Rule 8(b) is subject to harmless error analysis and does not require reversal unless it actually prejudices the defense by having a substantial and injurious effect or influence in determining the jury's verdict. The district court did provide proper limiting jury instructions with regard to count 1. The Supreme Court ordered that the judgment of the court of appeals be reversed in part and affirmed in part, and the case be remanded for further proceedings.

(Reversed and remanded. Dissent filed.)

United States v. Lane, 106 S. Ct. 725 (1986).

DEPARTMENT OF JUSTICE

Office of the Attorney General
Washington, D.C. 20530

13 March 1986

MEMORANDUM

TO: All Assistant Attorneys General
All United States Attorneys

FROM: EDWIN MEESE III
Attorney General

SUBJECT: Department Policy Regarding Consent Decrees and Settlement Agreements

The following policy is adopted to guide government attorneys involved in the negotiating of consent decrees and settlements. Adopted pursuant to the Attorney General's litigation and settlement authority, these guidelines are designed to ensure that litigation is terminated in a manner consistent with the proper roles of the Executive and the courts. They are to be followed in all cases tried by counsel under the direction of the Attorney General.

I. General Policy on Consent Decrees and Settlement Agreements

Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgement. In the past, however, executive departments and agencies have, on occasion, misused this device and forfeited the prerogatives of the Executive in order to preempt the exercise of those prerogatives by a subsequent Administration. These errors sometimes have resulted in an unwarranted expansion of the powers of judiciary -- often with the consent of government parties -- at the expense of the executive and legislative branches.

The executive branch and the legislative branch may be unduly hindered by at least three types of provisions that have been found in consent decrees:

1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.

2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.

In Section II these guidelines address each of these concerns and limit authority to enter into consent decrees that would require the Secretary or agency administrator to revise, amend or promulgate regulations; that would require the Secretary or agency administrator to expend funds which Congress has not appropriated, or to seek appropriations from Congress; or that would divest the Secretary or the agency administrator of discretion granted by the Constitution or by statue.

These limitations on entry into consent decrees that might include such provisions are required by the executive's position, that it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated.

The limitations in Section II.A. of the guidelines are not intended to discourage termination of litigation through negotiated settlements. The Attorney General has plenary authority to settle cases tried under his direction, including authority to enter into settlement agreements on terms that a court could not order if the suit were tried to conclusion. Settlement agreements -- similar in form to consent decrees, but not entered as an order of the court -- remain a perfectly permissible device for the parties and should be strongly encouraged. Section II.B., however, places some restrictions on the substantive provisions which may properly be included in settlement agreements. For example, Section II.B.1. allows a department or agency to agree in a settlement document to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA. Similarly, under Section II.B.2. the Secretary or agency administrator may agree to exercise his discretion in a particular manner, but may not divest himself entirely of the power to exercise that discretion as necessary in the future. The guidelines further provide that in certain circumstances where the agreement constrains agency discretion, a settlement agreement should specify that the only sanction for the government's failure to comply with a provision of a settlement agreement shall be the revival of the suit. Revival of the suit as the sole remedy removes the danger of a judicial order awarding damages or providing specific relief for breach of an undertaking in a settlement agreement.

Finally, it must be recognized that the Attorney General has broad flexibility and discretion in the conduct of litigation to respond to the realities of a particular case. Such flexibility can be exercised by the Attorney General in granting exceptions to this policy.

II. Policy Guidelines on Consent Decrees and Settlement Agreements

A. Consent Decrees

A department or agency should not limit its discretion by consent decree where it would assert that a similar limitation imposed by injunction unduly or improperly constrains executive discretion. In particular, the Department of Justice will not authorize any consent decree limiting department or agency authority in the following manner:

1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.

2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.

3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

B. Settlement Agreements

The Department of Justice will not authorize any settlement agreement that limits the discretion of a department or agency in the following manner:

1. The department or agency should not enter into a settlement agreement that interferes with the Secretary or agency administrator's authority to revise, amend, or promulgate regulations through the procedures set forth in the Administrative Procedure Act.

2. The department or agency should not enter into a settlement agreement that commits the Department or agency to

expend funds that Congress has not appropriated and that have not been budgeted for the action in question.

In any settlement agreement in which the Secretary or agency administrator agrees to exercise his discretion in a particular way, where such discretionary power was committed to him by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties, the sole remedy for the department or agency's failure to comply with those terms of the settlement agreement should be the revival of the suit.

C. Exceptions

The Attorney General does not hereby yield his necessary discretion to deal with the realities of any given case. If special circumstances require any departure from these guidelines, such proposed departure must be submitted for the approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General at least two weeks before the consent decree is to be entered, or the settlement agreement signed, with a concise statement of the case and of reasons why departure from these guidelines will not tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches. Written approval of the Attorney General, the Deputy Attorney General, or the Associate Attorney General will be required to authorize departure from these guidelines.

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%
03-14-86	7.06%
04-11-86	6.31%

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

For cumulative list of those Federal Civil Postjudgment Interest Rates effective October 1, 1982, through December 19, 1985, see United States Attorneys' Bulletin, Vol. 34, No. 1, page 25 (January 17, 1986).

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Editor-in-Chief: Jason P. Green FTS 633-4024
Editor: Judith C. Campbell FTS 673-6348

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TABLE OF CONTENTS

Page

COMMENDATIONS 193

CLEARINGHOUSE
- Application for Transfer of Federally Forfeited Property 195
- Criminal Division Monograph on the Travel Act, 18 U.S.C. §1952 195
- Office Management: Use of OCR Reduces Time to Copy Trial Documents 195

POINTS TO REMEMBER
- Personnel 196
- Requests for Authorization to Move for or Consent to Closure of all or Part of a Judicial Proceeding 196

CASENOTES
- OFFICE OF THE SOLICITOR GENERAL 196
- CIVIL DIVISION 197
- LAND AND NATURAL RESOURCES DIVISION 199
- UNITED STATES ATTORNEYS' OFFICES 201

APPENDIX 203

VOL. 34, NO. 8 THIRTY-THIRD YEAR JUNE 15, 1986

Please send change of address to Editor, United States Attorneys' Bulletin, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

COMMENDATIONS

The following Assistant United States Attorneys have been commended:

THOMAS M. BAUER and GREGORY C. SASSE (Ohio, Northern) by Special Agent-in-Charge Joseph E. Griffin, Federal Bureau of Investigation, for their excellent efforts in the prosecution of a complex narcotics case.

J. MATTHEW CAIN and KEVIN P. CONNOLLY (Ohio, Northern) by Assistant Director Joseph R. Davis, Legal Counsel Division, Federal Bureau of Investigation, for their outstanding participation in the New Agents Moot Court Program at the FBI Academy in Quantico, Virginia.

LANCE A. CALDWELL (Oregon) by Assistant Director James D. McKenzie, Federal Bureau of Investigation, for his outstanding presentation on the prosecutive approach to major bank fraud investigations at a FBI/FDIC specialized regional training seminar.

M. ELLEN DENNIS (Michigan, Eastern) by Deputy General Counsel Robert E. Coy, Veterans Administration, for her effective representation of a sex and race discrimination case.

NATHAN FISHBACH (Wisconsin, Eastern) by the Veterans Administration for his defense of a case involving multiple allegations of negligence by the Veterans Hospital in its treatment of the defendant; and by Mr. Monroe Woods, Regional Administrator, Food and Nutrition Service, Department of Agriculture, for his skillful handling of a case involving a recently enacted provision of the Food Stamp Act.

ERIC J. KLUMB (Wisconsin, Eastern) by Special Agent-in-Charge H. Ernest Woodby, Federal Bureau of Investigation, for his successful prosecution of an 18 U.S.C. §§1341 and 1343 violations case; and by the Winnebago, Wisconsin, Sheriff's Department for his outstanding job in prosecuting a narcotics trafficking case.

LINDA L. LATTIMORE (Texas, Southern) by Associate Director Phillip C. McGuire, Bureau of Alcohol, Tobacco and Firearms, for her successful prosecution of a case involving the manipulation of children to commit flagrant violations of federal firearms and tax laws.

CHRISTOPHER L. MILNER (Texas, Southern) by Associate Regional Commissioner David V. Vandersall, Immigration and Naturalization Service, for his presentation on prosecution strategies at the INS Southern Regional United States Attorneys Conference.

STEPHEN S. MORRIS and T. SCOTT WOODWARD (Texas, Southern) by Assistant Attorney General William Bradford Reynolds, Civil Rights Division, for their successful conclusion of two civil rights cases.

STANLEY L. PATCHELL (Arizona) by Assistant Federal Public Defender Pamela J. Franks, Phoenix, Arizona, for his cooperation, honesty and straightforwardness in dealing with opponent counsel in the Public Defender's office.

LAWRENCE S. ROBBINS (New York, Eastern) by Commissioner William von Robb, United States Customs Service, for his handling of a case involving shipments of dam equipment and parts in violation of the Hostage Crisis Embargo in 1980.

DEBORAH A. ROBINSON (District of Columbia) by Colonel Seymour Copperman, Chief, General Litigation Division, Office of the Judge Advocate General, Department of the Air Force, for her outstanding advocacy in a case involving debarment, contracts, Bivens claims, grand jury evidence, and DOD/DOJ/IRS Joint Task Force activities.

ERIC WILLIAM RUSCHKY (South Carolina) by Supervisory Senior Resident Agent William E. Nettles, Jr., Federal Bureau of Investigation, for his outstanding work and cooperation in prosecuting cases with the FBI; and by Special Agent-in-Charge, Bureau of Alcohol, Tobacco and Firearms, Department of Treasury, for his successful prosecution of a firearms fencing case.

NASH W. SCHOTT (Virginia, Eastern) by Deputy Assistant Attorney General Roger J. Marzulla, Land and Natural Resources Division, for his contribution to the litigation to compel the attendance of Anne Burford as an out-of-state witness in criminal proceedings in the State of Alabama.

DAVID STEPHENS and JOHN BARTON (South Carolina) by Chief A. Wendell Dixon, Criminal Investigation Division, Internal Revenue Service, for their successful prosecution of a tax protestor.

ANN MARIE TRACEY (Ohio, Southern) by Assistant Attorney General F. Henry Habicht II, Land and Natural Resources Division, for her successful prosecution of a case involving illegal disposal and failure to mark PCBs, and concealment and conspiracy to defraud the Environmental Protection Agency.

KENNETH E. VINES (Alabama, Middle) by Mr. Jeffrey Axelrad, Director, Torts Branch, Civil Division, for his excellent work in the successful resolution of a complex Federal Tort Claims Act case.

R. JEFFREY WAGNER (Wisconsin, Eastern) by Special Agent-in-Charge H. Ernest Woodby, Federal Bureau of Investigation, for his outstanding performance in the successful prosecution of a mail fraud case.

MARY C. WILLIAMS (District of Columbia) by Major General Robert D. Morgan, Commanding General, U.S. Army Communications-Electronics Command, Department of the Army, for her outstanding assistance with litigation challenging the award of the Single Channel Objective Tactical Terminal Contract; and by Brigadier General John L. Fugh, Assistant Judge Advocate General for Civil Law, Department of the Army, for her superb professional efforts in a case involving a $105 million negotiated procurement for development of advanced satellite communication terminals.

WAYNE P. WILLIAMS (District of Columbia) by Colonel E.D. George, Chief, Neurosurgery Service, Walter Reed Army Medical Center, for his successful defense of the government's interest in a case involving complex neurosurgical and neuroradiological medicolegal issues.

CLEARINGHOUSE

Application for Transfer of Federally Forfeited Property - Form DAG-71

The application for transfer of federally forfeited property (Form DAG-71) has been revised. In April a copy of the form was mailed to United States Attorneys for distribution to the various law enforcement agencies in their districts. The form may be photocopied. However, if you require an original copy of the form, please contact the Office of Legal Services at FTS 633-4024, and request item number CH-34.

(Executive Office)

Criminal Division Monograph on The Travel Act, 18 U.S.C. §1952

The Travel Act is one of the racketeering laws which United States Attorneys may include in an indictment without consulting Department of Justice headquarters. The Act has unusually wide applicability in federal criminal prosecutions, and is one of the more frequently applied criminal provisions.

The Organized Crime and Racketeering Section of the Criminal Division has compiled a monograph, dated March 1986, entitled "The Travel Act (18 U.S.C. §1952): Prosecution of Interstate Acts in Aid of Racketeering." The monograph should assist United States Attorneys' offices personnel in criminal cases applying the Travel Act. Use of the monograph should reduce research time into the Travel Act's extensive case law.

Copies of the monograph may be obtained by contacting the Office of Legal Services at FTS 633-4024. Please request item number CH-35.

(Executive Office)

Office Management: Use of OCR Reduces Time to Copy Trial Documents and is a Cost Savings to United States Attorney's Office

The Optical Character Reader (OCR) reads and formats documents into a word processing work file for subsequent modification/editing and printing. The New Jersey United States Attorney's Office has used its OCR to reduce the time and effort necessary to retype documents received from outside agencies. Prior to installation of the OCR, which handles twelve font types and reads 125 pages per hour, the New Jersey office edited and retyped lengthy transcripts received from phone interceptions prior to trial. The office's litigative resources were severely strained by this process. The use of the OCR to enter documents into the word processor for editing has reduced the time involved in reproducing necessary legal documents. For example, over 500 transcripts relevant to a drug case were read into the work file via the OCR and reformatted in three days. Previously, the same documents would have required three typists to retype them over a four week period. Or an outside service would have charged an estimated amount of $18,000, whereas the actual cost was less than $500--an obvious savings.

Additionally, the OCR makes it possible to build a document/brief bank by copying briefs, indictments, motions and other documents. The OCR can also be used to restore documents lost or damaged as a result of a word processor system malfunction.

If your office has an OCR and you would like to know more about how the New Jersey office is using their OCR to save time and money, contact Mr. Thomas Haggerty, System Manager, on FTS 341-2155.

(Executive Office)

POINTS TO REMEMBER

Personnel

Effective May 23, 1986, Jerome G. Arnold was court-appointed United States Attorney for the District of Minnesota.

(Executive Office)

Requests for Authorization to Move for or Consent to Closure of all or Part of a Judicial Proceeding

No Department attorney shall move for or consent to the closure of all or part of a judicial proceeding without the express authorization of the Deputy or Associate Attorney General. See 28 C.F.R. §50.9. Requests originating from Divisions supervised by the Deputy Attorney General require Deputy Attorney General authorization; ones originating from Divisions supervised by the Associate Attorney General require authorization by the Associate Attorney General. Requests to close proceedings supervised by the Criminal Division should be directed to the Head of the Legal Support Unit, Office of Enforcement Operations, at FTS 724-6672.

(Criminal Division)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A brief amicus curiae in Ansonia Board of Education v. Philbrook, 757 F.2d 476 (2d Cir. 1985). The issue is whether a school board contract that does not allow an employee to apply "necessary personal business" leave to days of mandatory religious observance violates Title VII of the Civil Rights Act of 1964.

A protective petition for certiorari in Dixon v. Bowen, 785 F.2d 1102 (2d Cir. 1986). The question presented is the validity of the "severity" regulation used by the Secretary of Health and Human Services when reviewing claims for disability benefits under the Social Security Act.

A petition for certiorari in Thomas v. Outboard Marine Corp., 773 F.2d 883 (7th Cir. 1985). The question presented is whether the Environmental Protection Agency has statutory authority to enter private property when necessary to plan the cleanup of environmental pollutants under the Comprehensive Environmental Response, Compensation and Liability Act.

A petition for certiorari in United States v. Mendoza-Lopez, 781 F.2d 111 (8th Cir. 1985). The issue is whether a defendant in a prosecution under 8 U.S.C. §1326 may collaterally attack the validity of the underlying deportation order.

A petition for certiorari in United States v. Schwartz, 785 F.2d 673 (9th Cir. 1986). The question is whether the Double Jeopardy Clause bars a prosecution appeal from the trial judge's dismissal of an indictment for insufficient evidence.

A brief amicus curiae in Michigan v. Shabaz, 424 Mich. 42 (1985). The question presented is whether the flight of an individual from the police, after attempting to hide a gun in a paper bag, into an area known for criminal activity constitutes reasonable suspicion for an investigative detention.

CIVIL DIVISION

SUPREME COURT ACCEPTS OUR ARGUMENT THAT CONGRESS HAS NOT BARRED WAIVERS OF ATTORNEY FEES WHEN ATTORNEYS SETTLE CLASS ACTION CASES IN WHICH ATTORNEYS' FEES ARE AUTHORIZED.

A Legal Aid office attorney filed a civil rights action against the State of Idaho on behalf of institutionalized children. The parties reached a settlement that provided for a waiver of attorneys' fees, but included significant non-monetary relief for the members of the class. The plaintiffs then sought attorneys' fees from the district court which had approved the settlement under Federal Rules of Civil Procedure 23 with the waiver of a fee. The district court denied the fee, but the Ninth Circuit reversed on appeal. The court of appeals ordered enforcement of the substantive aspects of the settlement and an award of an attorney fee. Idaho sought and was granted certiorari. The government filed a brief as amicus curiae, arguing that the Ninth Circuit had erred in finding that waivers of attorneys' fees under these circumstances are per se void. The Supreme Court agreed that Congress had not barred waivers of attorneys' fees, and that the district court had not acted improperly by denying a fee here. The Court found that there may be circumstances in which such waivers should be found to be fundamentally unfair (such as when they are forced upon a plaintiff by an unscrupulous defense attorney) and that the matter must be left in the discretion of the district court to determine in individual instances.

Evans v. Jeff D., ___U.S.___, No. 84-1288 (Apr. 21, 1986). D. J. # 145-0-1691. Attorneys: John F. Cordes (FTS 633-3380) and Douglas N. Letter (FTS 633-3602), Civil Division.

SIXTH CIRCUIT HOLDS FERES DOCTRINE AND INTENTIONAL TORT EXCEPTION BAR SURVIVOR'S CLAIM FOR NEGLIGENT ENLISTMENT AND NEGLIGENT SUPERVISION OF SERVICEMAN WHO WAS MURDERED OFF POST BY OTHER SERVICEMEN.

Plaintiff's son enlisted in the Army at age 17. During basic training, he was murdered by three Army privates while they were on a weekend pass away from the base. His mother brought this wrongful death action under the Federal Tort Claims Act. She alleged that the Army recruiters had been negligent and had violated Army regulations in accepting her son for enlistment because they did not secure her consent to his enlistment and because they failed to discover his juvenile criminal record. She also alleged that the Army had been negligent and had violated Army regulations in supervising her son and his assailants. The district court dismissed the action on the grounds that it was barred by both the doctrine of Feres v. United States, 340 U.S. 135 (1950), and by the intentional tort exception.

On appeal, the Sixth Circuit stayed the case pending the Supreme Court's decision in United States v. Shearer, 105 S.Ct. 3039 (1985). It has now held that Shearer is controlling. The Sixth Circuit held that Feres barred the negligent supervision claim, and that plaintiff's allegation that the Army had violated its own regulations was not a basis for distinguishing Shearer. The court also held that the claim of negligent enlistment was barred by the intentional tort exception, but acknowledged that Shearer had only "equivocal precedential value" on this issue. The court, however, found the opinion's "reasoning to be compelling." This application of Shearer is significant because the intentional tort exception is broader than the Feres doctrine, since the former applies to civilians as well as members of the military.

Satterfield v. United States, ___F.2d___, No. 83-5930 (6th Cir. Apr. 18, 1986). D. J. # 157-30-243. Attorneys: Anthony J. Steinmeyer (FTS 633-3388), Civil Division.

EIGHTH CIRCUIT, AFFIRMING DISTRICT COURT, RULES THAT GRANDPARENT DEEMING APPLIES IN THE AFDC PROGRAM WHEN THE MINOR PARENT MEETS THE AGE AND SCHOOL REQUIREMENTS FOR AFDC ELIGIBILITY.

Plaintiffs, a class of eighteen year old parents with dependent children living with their parents, brought suit challenging the Secretary's regulations regarding the grandparent deeming provision of the Deficit Reduction Act. The provision requires the Secretary to consider the income of grandparents in the AFDC household in determining AFDC eligibility and need when the minor parent of the dependent child lives with her parents, and when the minor parent "is under the age selected by the State pursuant to Section 606(a)(2)." The Secretary issued a regulation pursuant to this provision, applying grandparent deeming when the minor parent meets the age requirement without regard to the school attendance requirement of Section 606(a)(2). The district court invalidated the regulation, holding that these requirements were inseparable under 606(a)(2) and that the cross-reference in the grandparent deeming provision to Section 606(a)(2) necessarily incorporated both requirements. Based on this opinion, the court of appeals affirmed.

Morrison v. Heckler, ___F.2d___, No. 85-5098MN (8th Cir. Apr. 11, 1986). D. J. # 137-39-451. Attorneys: William Kanter (FTS 633-1597) and Deborah R. Kant (FTS 633-3424), Civil Division.

NINTH CIRCUIT HOLDS THAT DISCRETIONARY FUNCTION EXCEPTION PRECLUDES CHALLENGE TO BPA'S DECISION TO RELY ON FAA MINIMUM STANDARDS IN MARKING ITS TRANSMISSION LINES.

A pilot crashed after his airplane struck ground wires built by the Bonneville Power Administration (BPA) to protect its transmission lines. Plaintiff, the pilot's wife, brought suit against the BPA alleging that it was negligent in failing to alert pilots by installing marker spheres on the ground wires. The BPA argued that its decision not to install warning devices constituted a "discretionary function" within the meaning of the FTCA, primarily because it had relied on FAA recommendations in not marking this stretch of lines. The district court rejected that defense and assessed $315,000 in damages against the government.

The court of appeals reversed. It held that the discretionary function exception applies, because the BPA "affirmatively decided to adopt the FAA's policy," albeit with certain exceptions, its overall safety strategy was "grounded in social, economic, and political policy" and thus could not be secondguessed in a tort suit. The court also held that the rationale in Varig was fully applicable here since the BPA was acting in a proprietary and not a regulatory capacity.

Mitchell v. United States, ___F.2d___, No. 85-3744 (9th Cir. Apr. 15, 1986). D. J. # 157-81-357. Attorneys: Robert S. Greenspan (FTS 633-5428) and Harold J. Krent (FTS 633-3159), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

EAJA AWARD NOT AVAILABLE WHERE GOVERNMENT ULTIMATELY PREVAILED AND WHERE FEES WERE INCURRED IN OPPOSING NON-GOVERNMENTAL PARTIES.

An environmental group sued the Corps of Engineers and private developers, under the Clean Water Act (CWA), to enjoin land clearing activities on a tract that plaintiffs alleged was a wetland and thus required a Section 404 permit. Two trials were held. One to determine the wetland issue, and the other to determine what land clearing activities would require permitting. On appeal, the Fifth Circuit reversed the lower court's decision, and upheld EPA's 80% wetland determination.

The district court, thereafter, approved an award of attorneys' fees in excess of $100,000 against the government. On appeal from the award, the government, while conceding liability for fees incurred during the preliminary injunction phase of the litigation, argued that it should not be held liable for fees for the two trials and the appeal. The court of appeals completely disallowed fees for the wetlands trial and the appeal. The court held that fees would be improper for the activities trial, but remanded for the district court to consider the bearing of the primary jurisdiction issue on the fee award. The court cautioned that if the district court still found it appropriate to award fees solely against the government, the burden would be on the plaintiff to prove that the fees "were incurred in opposing improper government resistance to their rightful demands." The court made clear that the "when appropriate" standard for awarding fees under the CWA does not permit fees where, as here, the government ultimately prevailed and where fees were incurred in opposing non-governmental parties.

Avoyelles Sportsmen's League v. Marsh, ___F.2d___, No. 85-4202 (5th Cir. Apr. 2, 1986). D. J. # 62-33-64. Attorneys: Maria A. Iizuka (FTS 633-2753) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

DRAINING WETLANDS DOES NOT QUALIFY FOR AGRICULTURAL EXEMPTION UNDER SECTION 404(f) OF THE CLEAN WATER ACT.

This was an appeal from the granting of a preliminary injunction against a farmer who wished to build certain improvements on his land, which was largely wetland. His improvements would have had the effect of draining much of the land. He claimed that the land had been continuously farmed for a long period of time and that he was entitled to an exemption from Corps regulation under Section 404(f) of the Clean Water Act. That section allows discharges of dredged or filled materials as part of normal farming operations, among other things. The court found that the exceptions should be construed narrowly, and found that the farmer did not come within them.

United States v. Akers, ___F.2d___, No. 85-1750 (9th Cir. Mar. 26, 1986). D. J. # 90-5-1-1-2185. Attorneys: Edward J. Shawaker (FTS 633-4010) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

KNOWLEDGE NOT AN ELEMENT FOR CONVICTION UNDER RESOURCE CONSERVATION AND RECOVERY ACT.

Finding the evidence in the record sufficient for conviction, the court of appeals reversed the district court's order granting defendants' motions for judgments of acquittal, notwithstanding the jury's guilty verdict. Defendants were prosecuted for knowingly transporting a hazardous waste to a facility without a hazardous waste permit in violation of 42 U.S.C. §6928(d)(1) of the Resource Conservation and Recovery Act (RCRA), a felony. A central issue on appeal was the degree of knowledge necessary for conviction. The court of appeals held that for conviction under 42 U.S.C. §6928(d)(1) knowledge of RCRA regulations is not required. Thus in a prosecution under 42 U.S.C. §6928(d)(1), it is not a defense to claim no knowledge that a material was a hazardous waste within the meaning of RCRA's regulations nor to claim ignorance of the permit regulations. The court held that the government must show that the defendant knew the nature of the waste (here paint and solvents) and also must show that the defendant knew the permit status of the facility. This latter burden, in the court's view, is met if the government shows that the defendant willfully failed to determine the permit status of the facility. "[I]f the transporter does not know a permit is required, but knows the facility does not have one, or knows he has not inquired, then sufficient knowledge is shown."

United States v. Hayes International, ___F.2d___, No. 84-7796 (11th Cir. Apr. 21, 1986). D. J. # 62-2-2. Attorneys: J. Carol Williams (FTS 633-2757) and Dirk D. Snel (FTS 633-4400), Land and Natural Resources Division.

EAJA FEES NOT RECOVERABLE IN TORT CASES.

Valdez, an enrolled member of the Navajo Tribe, sued the United States asserting a breach of duty where the Bureau of Indian Affairs allegedly disbursed funds improperly from his individual Indian money account. The case was settled and Valdez, thereafter, sought attorneys' fees under the Equal Access to Justice Act (EAJA) and the Federal Tort Claims Act. His application for fees was denied.

The court of appeals affirmed. On appeal, the government argued that fees for tort cases may not be recovered under EAJA. Even if Valdez's claim could arguably come under EAJA, the government's position was substantially justified.

Valdez v. United States, ___F.2d___, No. 84-1680 (10th Cir. Apr. 1, 1986). D. J. # 90-2-4-871. Attorneys: Maria A. Iizuka (FTS 633-2753) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

UNITED STATES ATTORNEYS' OFFICES

CALIFORNIA, EASTERN

DISTRICT COURT RULES THAT 21 U.S.C. §881(a)(7) IS INTENDED TO PERMIT FORFEITURE OF THE ENTIRE LOT OR TRACT OF LAND UPON WHICH A FELONY DRUG VIOLATION OCCURS.

Claimant requested dismissal of the government's request for forfeiture in rem of a parcel of land used to grow marijuana. Claimant argued that 21 U.S.C. §881(a)(7) should be narrowly construed to permit forfeiture only of that portion of the property directly connected to the illegal activity. After review of the legislative history of the statute, the court concluded that Congress intended the statute to be construed broadly, and that the statute is intended to permit forfeiture of the entire lot or tract of land upon which a felony drug violation occurs even if the violation occurs on only a small portion of the property.

United States v. Real Property, Plumas County, APN: 122-210-08, ___F. Supp. ___, Civ. No. S-85-1360-LKK (E.D. Cal. Apr. 1, 1986). Attorneys: Gregory G. Hollows, Assistant United States Attorney, Eastern District, California (FTS 440-2331).

MICHIGAN, EASTERN

THE "SUE AND BE SUED" CLAUSES OF THE HOUSING ACTS DO NOT WAIVE SOVEREIGN IMMUNITY WITH RESPECT TO §1981 AND §1982 ACTIONS FOR DAMAGES AGAINST HUD.

In Selden, the Sixth Circuit held, inter alia, that the "sue and be sued" clauses of the Housing Acts (12 U.S.C. §1702 and 42 U.S.C. §1404a) do not waive sovereign immunity with respect to §1981 and §1982 actions for damages brought against HUD. The court found that those "sue and be sued" clauses only waive sovereign immunity for claims against HUD which set forth violations of substantive provisions of the Housing Acts. There is very little published law on this issue, and there is a split in the circuits as to the correct analysis of the issue. The Sixth Circuit's opinion carefully reviews the existing case law and ultimately applies the sovereign immunity analysis initially set forth in FHA v. Burr, 309 U.S. 240 (1940).

Selden Apts. v. U.S. Dept. of Housing and Urban Development, ___ F.2d ___, No. 85-1048 (6th Cir. Mar. 7, 1986). Attorneys: Jan Kittel Mann (FTS 226-6175) and Geneva Halliday (FTS 226-2163), Assistant United States Attorneys, Eastern District, Michigan.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
TELETYPES TO ALL UNITED STATES ATTORNEYS

04-29-86	From William P. Tyson, Director, by Laurence S. McWhorter, Deputy Director, re: "Financial Disclosure Reports - Annual Filing Date."
05-13-86	From C. Madison Brewer, Director, Office of Management Information Systems and Support, by Tim Murphy, Assistant Director, Debt Collections Staff, re: "Change in Federal Civil Postjudgment Interest Rates."
05-16-86	From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Postion Vacancy: Deputy Chief for Litigation, General Litigation and Legal Advice Section, Criminal Division."
05-16-86	From William P. Tyson, Director, by Thomas Schrup, Acting Director, Office of Legal Education, re: "Criminal Trial Advocacy Course - June 16-27, 1986."
05-22-86	From Richard E. DeHaan, Director, Office of Administration and Review, re: Expiration of Interim Civil Service Retirement System."
05-23-86	From William P. Tyson, Director, re: Attorney General Meese's Appearance on the David Brinkley Show."
05-28-86	From William P. Tyson, Director, re: "Contacts with Heads of Federal Agencies Regarding Information Relevant To Budget Formulation and Resource Allocation."

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%
03-14-86	7.06%
04-11-86	6.31%
05-14-86	6.56%

NOTE: When computing interest at the daily rate, round (5/4) the product (*i.e.*, the amount of interest computed) to the nearest whole cent.

For cumulative list of those Federal Civil Postjudgment Interest Rates effective October 1, 1982, through December 19, 1985, see *United States Attorneys' Bulletin*, Vol. 34, No. 1, Page 25, January 17, 1986.

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EXECUTIVE
OFFICE FOR
UNITED
STATES
ATTORNEYS

William P. Tyson, Director

Editor-in-Chief:	Jason P. Green	FTS 633-4024
Editor:	Judith C. Campbell	FTS 673-6348

TABLE OF CONTENTS

Page

COMMENDATIONS.. 207

CLEARINGHOUSE
  RICO Case Summaries.. 209

POINTS TO REMEMBER
  Allegations of Misconduct Against Assistant United States Attorneys.... 209
  Career Opportunities... 209
  Department Policy with Respect to Antitrust Litigation............. 209
  Personnel.. 210
  Plea Agreements: Fact Stipulations Relating to the Parole Decision.... 210

CASENOTES
  OFFICE OF THE SOLICITOR GENERAL.................................... 211
  CIVIL DIVISION... 212
  LAND AND NATURAL RESOURCES DIVISION................................ 214
  UNITED STATES ATTORNEYS' OFFICES................................... 216
  FEDERAL RULES.. 217

APPENDIX..
  Allegations of Misconduct Against Assistant United States Attorneys
    (Memorandum of May 30, 1986, from William P. Tyson)............... 218
  Listing of Bluesheets in Effect.................................... 219
  List of *United States Manual* Transmittals........................ 220
  List of United States Attorneys.................................... 230

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COMMENDATIONS

The following Assistant United States Attorneys have been commended:

RICHARD G. ANDREWS (Delaware) by Regional Inspector Benjamin Redmond, Internal Revenue Service, for his successful prosecution of a public corruption case.

JAMES R. ARNOLD (California, Central) by Colonel D. Fred Butler, District Engineer, Army Corps of Engineers, for his successful defense of a challenge to the operation of Corps' reservoir for both flood control and water conservation.

L. DIANE BARDSLEY (California, Central) by Chief of Police Leo E. Peart, City of Irvine, for her successful prosecution of a forfeiture case.

WILLIAM BRANIFF (California, Southern) by Walter T. Skallerup, Jr., General Counsel of the Navy, for his successful conclusion of a complex government contract fraud case.

KATHLEEN M. BRINKMAN and JOHN J. CRUZE (Ohio, Southern) by Special Agent-in-Charge Terence D. Dinan, Federal Bureau of Investigation, for their successful defense of a Federal Tort Claims Act case.

WILLIAM B. CARR and BUCKY P. MANSUY (Pennsylvania, Eastern) by Inspector General Sherman M. Funk, Department of Commerce, for their prosecution of a multi-million dollar government contract fraud case.

ALLEEN S. CASTELLANI (Kansas) by Regional Administrator David B. Alspach, Department of Agriculture, for her successful prosecution of a retailer for repeat violations of Food Stamp Program rules.

BARBARA JO COHAN (Pennsylvania, Eastern) by Special Agent-in-Charge Norton J. Wilder, Drug Enforcement Administration, for her prosecution of a drug case.

SUSAN A. EHRLICH (Arizona) by Chief David C. Arnell, Criminal Investigation Division, Internal Revenue Service, for her presentation on Varbel and its repercussions at the Continuing Professional Education Seminar on May 15, 1986.

WILLIAM F. FAHEY and MANUEL A. MEDRANO (California, Central) by Special Agent-in-Charge Alan D. Walls, United States Customs Service, for their successful prosecution of a cocaine trafficking and food stamps fraud case.

C. CLEVELAND GAMBILL (Kentucky, Western) by Special Agent-in-Charge Joel A. Carlson, Federal Bureau of Investigation, for his successful prosecution of United States v. Lewis.

PAUL L. GRAY and THOMAS J. RUETER (Pennsylvania, Eastern) by Supervisory Park Ranger E. Scott Kalbach, Department of the Interior, for training provided to Department of the Interior personnel regarding the United States Code.

GORDON A. GREENBERG and JON C. CEDERBERG (California, Central) by Assistant Special Agent-in-Charge Al Devetko, Drug Enforcement Administration, for their excellent work in the prosecution of a drug case.

WILLIAM S. HALSCH (New Jersey) by William P. Tyson, Director, Executive Office for United States Attorneys, for his successful efforts in litigating two Public Health Service cases.

GREGORY K. HARRIS (Illinois, Central) by Special Agent-in-Charge James R. Reeves, Bureau of Alcohol, Tobacco and Firearms, for his successful prosecutions of ATF cases.

THOMAS J. HOPKINS (California, Eastern) by Forest Supervisor Richard A. Henry, Lassen National Forest, Department of Agriculture, for his successful prosecution of a firewood theft case and for successfully negotiating a settlement on three civil suits filed against the United States.

CHARLES HYDER (Arizona) by Special Agent-in-Charge Robert J. Skopeck, Bureau of Alcohol, Tobacco and Firearms, for his successful prosecution of two arson cases.

MARCIA W. JOHNSON and CARLA D. MOORE (Ohio, Northern) by District Counsel Russell A. Ezolt, Immigration and Naturalization Service, for their excellent efforts in an asset forfeiture case.

JOYCE A. KARLIN (California, Central) by Special Agent-in-Charge Ted W. Hunter, Drug Enforcement Administration, for her successful prosecution of an illegal prescription drugs case.

DAVID A. KATZ (California, Central) by Postal Inspector-in-Charge W. J. Maisch, United States Postal Service, for his outstanding trial prosecution of an armed postal robbery case.

STEPHEN J. KOROTASH (Oklahoma, Western) by Inspector General John V. Giaziano, Department of Agriculture, for his successful prosecution of a million dollar embezzlement case.

CHARLES G. LABELLA (New York, Southern) by Acting Regional Inspector William R. Morrison, Internal Revenue Service, for his effective efforts in a bribery and conspiracy case.

RONALD H. LEVINE and JEFFERY W. WHITT, (Pennsylvania, Eastern) by Special Agent-in-Charge Wayne G. Davis, Federal Bureau of Investigation, for their prosecution of a very complicated multi-million dollar check-kite case.

CARLOS A. MARTIR, JR. (Pennsylvania, Eastern) by Special Agent-in-Charge Donald E. Cox, Bureau of Alcohol, Tobacco and Firearms, for his prosecution of a firearm possession case.

HARRY J. MCCARTHY and ROBERT H. WESTINGHOUSE (Washington, Western) by Assistant Inspector General for Investigations Stephen N. Marcia, Small Business Administration, for their work in the successful retrial of a fraud case.

KENNETH E. VINES (Alabama, Middle) by Director Jeffrey Axelrad, Torts Branch, Civil Division, for his exemplary victory in a difficult Federal Tort Claims Act case.

CLEARINGHOUSE

RICO Case Summaries

The Organized Crime and Racketeering Section of the Criminal Division has prepared two computerized sets of summaries of RICO decisions. One set lists cases alphabetically with their significant holdings; the other set lists all the categories of RICO issues numerically and sets forth the pertinent holdings of each case in which each issue was addressed. The summaries cover all opinions summarized from June 1985 through April 1986, and will serve as an interim supplement to the RICO Manual, which includes cases through June 1985. An Assistant United States Attorney interested in obtaining a copy of the RICO summaries should contact the Office of Legal Services at FTS 633-4024. Please request item number CH-36.

The Criminal Division also can provide up-to-date computerized printouts of the RICO holdings on any given issue or combination of issues upon request. Such reports also can be limited to include cases from a given circuit, or criminal cases only. An Assistant interested in obtaining information on a specific issue should contact Alexander S. White, Organized Crime and Racketeering Section, at FTS 633-1214.

(Executive Office)

POINTS TO REMEMBER

Allegations of Misconduct Against Assistant United States Attorneys

Appended to this Bulletin is a copy of the May 30, 1986, memorandum from Mr. William P. Tyson, Director, Executive Office for United States Attorneys. The memorandum reiterates the requirement that United States Attorneys report promptly all allegations of misconduct concerning Assistant United States Attorneys and other Department employees in their offices, including state bar matters, to the Office of Professional Responsibility and the Executive Office pursuant to the provisions of 28 C.F.R. §0.39a and USAM 1-4.200.

(Executive Office)

Career Opportunities

The Office of Criminal Enforcement, Environmental Protection Agency, is seeking an attorney at the GS-13 or GS-14 level to specialize in environmental criminal enforcement. If interested, contact Randall Lutz, Director, Office of Criminal Enforcement, EPA, Suite 712, 1921 Jefferson Davis Highway, Arlington, VA 22202.

(Environmental Protection Agency)

Department Policy With Respect To Antitrust Litigation

By memorandum of June 4, 1986, Attorney General Edwin Meese III expressed concern that in recent years several United States Attorneys have commenced antitrust investigations or filed antitrust cases without obtaining the prior approval of the Assistant Attorney General of the Antitrust Division. United States Attorneys and their Assistants are reminded that Department regulations provide that the Assistant Attorney General of the Antitrust Division has the responsibility to conduct, handle or supervise all civil and criminal antitrust proceedings. 28 C.F.R. §0.40(a). Therefore, a United States Attorney who wishes to investigate a suspected antitrust violation, convene a grand jury to investigate possible antitrust violations, or file a civil or criminal antitrust case must obtain the express approval of the Assistant Attorney General of the Antitrust Division prior to taking such action. The procedures that must be followed to obtain the necessary authorization are explained fully in Title 7 of the United States Attorneys' Manual.

(Executive Office)

Personnel

Effective June 2, 1986, Henry E. Hudson was sworn in as the Presidentially-appointed United States Attorney for the Eastern District of Virginia.

Effective June 3, 1986, K. William O'Connor was sworn in as the Presidentially-appointed United States Attorney for the District of Guam and the North Mariana Islands.

Effective June 9, 1986, Breckinridge L. Willcox was sworn in as the Presidentially-appointed United States Attorney for the District of Maryland.

Effective June 23, 1986, Peter A. Nowinski was court-appointed United States Attorney for the Eastern District of California.

Effective June 24, 1986, Roger P. Williams was court-appointed United States Attorney for the Western District of New York.

(Executive Office)

Plea Agreements: Fact Stipulations Relating to the Parole Decision

In negotiating plea agreements, United States Attorneys are frequently asked to accede to stipulations designed to downgrade the severity of the defendant's actual offense behavior as charged in the count or counts of the indictment to which the plea will be taken. (This proposal of an artificial offense for purposes of the plea is often demanded in addition to the dismissal of other counts of the indictment).

Typically, defense counsel seeks to have the government stipulate that the defendant had a minor role in the drug conspiracy rather than a managerial or proprietary role. Likewise, the defense will be anxious to obtain a stipulation that the amount of the controlled substances with which his or her client was involved was a relatively small part of the total operation. Since under Parole Commission guidelines an inmate's managerial or proprietary interest in the operation and the amount of drugs are crucial elements in the rating of severity of the offense, defense counsel obviously hope and expect that the altered facts in the stipulation will lower the amount of time to be served.

United States Attorneys should be aware that the Parole Commission gives no effect to such stipulated artificial offenses under its statutory mandate to consider the nature and circumstances of the offense and the history and characteristics of the prisoner, 18 U.S.C. §4206. This corresponds to the Commission's use in its decision of all offense behaviors in dismissed counts of the indictment if a preponderance of the evidence indicates that the charged behavior actually occurred.

In fairness to defendants and to prevent needless post-conviction attack on the plea, Assistant United States Attorneys should make sure that the parole consequences of such plea agreements are understood by defendants and their counsel.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A petition for certiorari in United States v. McAfee, 780 F.2d 143 (1st Cir. 1985). The question is whether the court of appeals erred by inquiring into the reason for the delay in scheduling a hearing on a motion, where the Speedy Trial Act automatically excludes the entire time period between the filing of and hearing on the motion.

A petition for certiorari in Hector v. INS, No. 85-1113 (3d Cir. 1985). The issue is whether a deportable alien may suspend deportation under 8 U.S.C. §1254 (a)(1), where the alien asserts that his niece qualifies as a "child" under the statute, which requires a showing of extreme hardship to the alien or his child.

A brief amicus curiae in Turner v. Safley, 777 F.2d 1307 (8th Cir. 1985). The question presented is whether a rational relationship test, rather than a strict scrutiny approach, should be applied to a constitutional challenge to state prison regulations limiting inmate-to-inmate correspondence and inmate marriage.

A brief amicus curiae in California Hospital Association v. Henning, 770 F.2d 856 (9th Cir. 1985). The question presented is the validity of the Department of Labor's "payroll practices" regulation, 29 C.F.R. §2510.3-(b), which provides that an employer who pays an employee's salary out of its general assets while the employee is on vacation does not maintain a "welfare benefit plan" under ERISA.

A brief amicus curiae in Colorado v. Bertine, 705 P.2d 411 (Colo. 1985). The issue is whether the Fourth Amendment permits law enforcement officers, in the course of lawfully impounding a motor vehicle, to inventory the contents of containers found in the interior of the vehicle.

A brief amicus curiae in Illinois v. Krull, 481 N.E.2d 703 (Ill. 1985). The issue is whether the rule of United States v. Leon should be extended to permit admission of evidence seized as a result of an officer's reasonable belief that a warrantless administrative search specifically authorized by state law did not violate the Fourth Amendment.

CIVIL DIVISION

SUPREME COURT UPHOLDS CONSTITUTIONALITY OF SOCIAL SECURITY ACT PROVISIONS WHICH AUTHORIZED PAYMENT OF BENEFITS TO SURVIVING WIDOWED SPOUSES, BUT NOT SURVIVING DIVORCED SPOUSES, WHO REMARRIED AFTER AGE 60.

Provisions of the Social Security Act in effect between 1979 and 1983 authorized payment of benefits to surviving widowed spouses, but not surviving divorced spouses, who remarried after age 60. A group of surviving divorced spouses challenged the provision on equal protection grounds. The district court found the statute to be unconstitutional because it found no reason for Congress to rationally distinguish between surviving widowed spouses and surviving divorced spouses upon subsequent remarriage, since it had entitled both classes to benefits upon the death of the wage earner.

On direct appeal, the Supreme Court reversed. The Court held that the statute passed constitutional muster because divorced widowed spouses did not enter the marriage with the same level of dependency on the wage earner's account as widows or widowers. The Court determined that it was not reasonable to infer, as the district court had, that simply because both classes were paid survivor's benefits, Congress believed that both classes were identically situated.

Bowen v. Owens, ___U.S.___, No. 84-1905, (May 19, 1986). D. J. # 137-12C-1072. Attorneys: William Kanter (FTS 633-1597) and Carlene V. McIntyre (FTS 633-5459), Civil Division.

SUPREME COURT AFFIRMS INJUNCTION REQUIRING THE SECRETARY OF HHS TO REOPEN AND READJUDICATE THE CLAIMS OF MENTALLY IMPAIRED SOCIAL SECURITY CLAIMANTS GOING BACK TO APRIL 1, 1980.

Eight unnamed individual plaintiffs, the City and State of New York brought this class action for declaratory and injunctive relief, alleging that the Secretary of HHS had established unwritten practices, policies, and standards for the evaluation of mental impairments under Titles II and XVI of the Social Security Act in contravention of existing regulations. The district court ruled in favor of the plaintiffs and ordered the Secretary to reopen and readjudicate claims going back to April 1, 1980, and to reinstate to benefits those whose benefits had been terminated. The court of appeals affirmed. The Supreme Court granted the government's petition for a writ of certiorari on the issues of the 60-day filing requirement and exhaustion under §405(g).

The Supreme Court affirmed, holding that the 60-day filing requirement was not jurisdictional but rather a period of limitations. And although a limitations period with respect to the government is a condition on the waiver of sovereign immunity and thus must be strictly construed, it determined that the principle of equitable tolling would apply to §405(g)'s limitations period and that the limitations period should be tolled in the circumstances of this case because of the "secretive" nature of the Secretary's challenged policies. As to exhaustion, the Court determined that the collateral issue doctrine in Mathews v. Eldridge would apply to excuse exhaustion because the plaintiffs' claims concerning the failure of the Secretary to follow procedures correctly were collateral, because many of the class members would have suffered irreparable injury in the form of "severe medical setbacks," and because exhaustion was futile.

Bowen v. City of New York, ___U.S.___, No. 84-1923 (June 2, 1986). D. J. # 137-52-1052. Attorneys: William Kanter (FTS 633-1597) and Howard S. Scher (FTS 633-4820), Civil Division.

D.C. CIRCUIT SUBSTANTIALLY AFFIRMS ADEQUACY OF SEARCH AND PROCESSING OF MASSIVE FOIA REQUEST.

The D.C. Circuit, with one minor exception, affirmed the district court's decision in an extensive and demanding Freedom of Information Act case which involved several government agencies. The court held that agency affidavits concerning the scope of the search are entitled to a "presumption of good faith" if they describe with reasonable detail the scope and method of the search effort. It reiterated that the test is not whether every responsive document is retrieved but whether the search is reasonably designed to retrieve requested documents. It held that plaintiffs' "countervailing evidence," which included allegations of bad faith based on earlier intransigence, the fact that seemingly relevant files referred to in other released files were not retrieved and plaintiffs' speculation that certain other files must exist, was insufficient as a matter of law to raise questions of material fact regarding the adequacy of the search. It sustained the district court's order that narrowed the scope of the FOIA request, and approved the sampling technique employed to test the exemption claims as proper. Finally, the court held that the district court did not abuse its discretion in denying discovery because it found the record adequate to support summary judgment, and that the court did not abuse its discretion in refusing to appoint a special master, observing that special masters are the exception rather than the rule. However, the court found an error rate of nearly 25% as to the exemptions claimed for approximately 70,000 documents retrieved and processed before the court set the scope of the search. It remanded these documents for reprocessing under current exemption standards.

Meeropol v. Meese, ___F.2d___, No. 84-5283 (D.C. Cir. May 20, 1986). D. J. # 145-12-2422. Attorneys: Leonard Schaitman (FTS 633-3441) and Freddi Lipstein (FTS 633-3542), Civil Division.

D.C CIRCUIT SUSTAINS VA DENIAL OF BENEFITS TO ALCOHOLICS, CREATING CONFLICT WITH SIXTH CIRCUIT.

Honorably discharged veterans are entitled to educational assistance benefits, provided that they are used within ten years of discharge. 38 U.S.C. §1661(a)(1). However, an extension of the ten-year period is available if the veteran is unable to use his benefits "because of a physical or mental disability which was not the result of such veteran's own willful misconduct." Id. Where alcoholism is the cause of the disability, and no secondary disabling physical condition has resulted, the VA's policy is to deny benefits unless it can be shown that the alcoholism is the result of an underlying psychiatric disorder. The VA's policy has been challenged on the ground that it discriminates against handicapped persons in violation of the Rehabilitation Act.

The threshold question is whether the courts have jurisdiction, in view of 38 U.S.C. §211(a). The Second Circuit denied jurisdiction. See, Traynor v. Walters, No. 85-6208 (May 16, 1986). The Sixth Circuit has taken jurisdiction, see, Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985), and held that the VA's policy constitutes handicap discrimination under the Rehabilitation Act. However, the D.C. Circuit disagreed. It assumed jurisdiction, but on very limited grounds, pointing out that when the case was processed administratively no Rehabilitation Act claim was made, and the VA apparently took the position that it had no jurisdiction to consider such a claim. The court concluded that "[s]ection 211(a)'s preclusion of review depends, at a minimum, on the satisfaction of this condition: the petitioner's claim must have been resolved by an action 'decision of the Administrator.'" However, the court made clear, that it expected the VA to decide future claims under the Rehabilitation Act, but left open the issue of whether it would hold that judicial review was precluded under 38 U.S.C. §211(a). The court held that the VA's policy denies benefits on the basis of conduct rather than on the basis of handicap.

McKelvey v. Turnage, ___F.2d___, No. 84-5910 (D.C. Cir. May 30, 1986). D. J. # 157-16-7578. Attorneys: Anthony J. Steinmeyer (FTS 633-3388) and Robert V. Zener (FTS 633-4027), Civil Division.

NINTH CIRCUIT HOLDS INS CANNOT BE ESTOPPED BY MISSTATEMENT OF CONSULAR OFFICIAL.

The district court had imposed an equitable estoppel against the Immigration and Naturalization Service (INS), preventing the deportation of an individual who failed to meet statutory criteria for remaining in this country. Estoppel had been imposed because a consular official made misstatements to the plaintiff. In reversing the lower court, the Ninth Circuit held that simple negligence does not reach the level of misconduct required for an estoppel of the government, and that persons dealing with the government are charged with knowledge of government statutes and regulations.

Mukherjee v. Immigration and Naturalization Service, ___F.2d___, Nos. 85-3723, 85-3761 (9th Cir. Apr. 21, 1986). D. J. # 9-61-124. Attorneys: Barbara Herwig (FTS 633-5425), Richard A. Olderman (FTS 633-4052), and Alfred R. Mollin (FTS 633-4116), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

EPA DID NOT VIOLATE FOURTH AMENDMENT BY PROCURING AERIAL PHOTOGRAPHS OF MANUFACURING PLANT.

Dow challenged the Environmental Protection Agency's (EPA) procurement of aerial photographs of the company's Midland, Michigan, plant. It claimed that (1) aerial photography was beyond EPA's statutory authority and (2) that EPA's actions violated the Fourth Amendment. The Supreme Court ruled that the general power to investigate includes using such techniques as aerial photography and those techniques need not be specifically authorized by statute. It also held that aerial photography of a commercial establishment from navigable airspace using commercially available photographic equipment did not constitute a search within the meaning of the Fourth Amendment.

Dow Chemical Co. v. United States, ___ U.S. ___, No. 84-1259 (May 19, 1986). D. J. # 90-5-2-4-50. Attorneys: Anne S. Almy (FTS 633-2749) and Dirk D. Snel (FTS 633-4400), Land and Natural Resources Division.

STATUTE OF LIMITATIONS APPLIES TO TRIBE'S CLAIM.

The Catawba Indian Tribe brought an action in district court, claiming 225 square miles of land in South Carolina, which by a 1763 treaty with Great Britain was to be their permanent settlement. In an 1840 treaty with South Carolina, the Tribe conveyed its interest in the subject tract to the State in exchange for a new reservation. The Tribe maintained this transaction was void, *inter alia* because the United States did not consent to the conveyance as required by the Nonintercourse Act of 1790. In 1959, Congress enacted the Catawba Indian Tribe Division of Assets Act, authorizing distribution of tribal assets to members of the Tribe and terminating federal responsibility for the Tribe and its individual members.

The district court granted South Carolina's motion for summary judgment. The Fourth Circuit reversed, and the Supreme Court reversed the court of appeals. The Court found that the Catawba Act specifically states that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians. It held that the explicit redefinition of the federal relationship reflected in the clear language of the Act requires the application of the state statute of limitations to the Tribe's claim. The case was remanded to the court of appeals for consideration of whether the Tribe's claim is barred by the State's statute of limitations.

South Carolina v. Catawba Indian Tribe of South Carolina, ___ U.S. ___, No. 84-782 (June 2, 1986). D. J. # 90-2-20-1020. Attorneys: Arthur E. Gowran (FTS 633-2754) and Jacques B. Gelin (FTS 633-2762), Land and Natural Resources Division.

CALICHE NOT A MINERAL RESERVED TO THE UNITED STATES IN A TAYLOR GRAZING ACT EXCHANGE PATENT.

The Tenth Circuit reversed the district court and held that caliche is not a mineral reserved to the United States in a Taylor Grazing Act exchange patent. The panel indicated that the intention of Congress as to the scope of the patent mineral reservation was not a factor because, unlike most statutes, the Taylor Grazing Act did not require a mineral reservation, but instead gave the Secretary discretion to determine the scope of a reservation, if any. The court asserted that after the exchange patent issue, BLM changed its policy and began to construe mineral reservations to include caliche. The court suggested that caliche was not a reserved mineral because it is a material sold pursuant to the Materials Act, as amended by the Surface Resources Act, rather than a locatable mineral. On authority of Watt v. Western Nuclear, 462 U.S. 36 (1983), the court also suggested that reserved minerals are minerals locatable under the mining laws, and caliche is not the kind of mineral which was locatable.

Poverty Flats Land & Cattle Co. v. United States, ___F.2d___, No. 84-1515, (10th Cir. Apr. 11, 1986). D. J. # 90-1-5-2165. Attorneys: Ellen J. Durkee (FTS 633-3888) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

COAST GUARD'S DETERMINATION THAT PERMITTEE COMMENCED CONSTRUCTION OF BRIDGE WITHIN TERMS OF PERMIT ENTITLED TO DEFERENCE.

Plaintiffs, representing maritime interests opposed to construction of a bridge across the St. John's River at Dames Point, in Jacksonville, Florida, sued to challenge the Coast Guard's determination that driving of a test pile for the bridge constituted "commencement of construction" prior to expiration of a bridge-building permit. The district court entered summary judgment for defendants. The court of appeals affirmed, holding (1) the determination by the Coast Guard, which allegedly deviated from the Agency's internal bridge administration manual, was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law within the meaning of Section 706(2)(A) of the APA, and (2) the Coast Guard, in making its determination, could properly limit its inquiry as to whether actual work at the bridge site had commenced, or whether a bonded contract for construction of the bridge had been signed.

Port of Jacksonville Maritime Ad Hoc Committee, Inc. v. U.S. Coast Guard and Jacksonville Transportation Authority, ___F.2d___, No. 85-3178 (11th Cir. May 6, 1986). D. J. # 90-1-1-2756. Attorneys: Jacques B. Gelin (FTS 633-2762) and Robert L. Klarquist (FTS 633-5580), Land and Natural Resources Division.

UNITED STATES ATTORNEYS' OFFICES

WISCONSIN, EASTERN

DISTRICT COURT DENIES RETAILER'S REQUEST FOR STAY IN FOOD STAMP DISQUALIFICATION CASE.

The Department of Agriculture's Food and Nutrition Service disqualified plaintiff retailer from the Food Stamp Program for three years. Shortly thereafter, the retailer requested judicial review (7 U.S.C. §2023) of the disqualification and a stay pending said review. In a decision dated March 26, 1986, the request for a stay was denied.

In denying the stay, the court utilized 7 U.S.C. §2023(a), which was recently amended by the Food Security Act of 1985, Pub. L. No. 93-198, 99 Stat. 1537, 1585 (1985). Under the amended act, the court, in determining whether the disqualification should be stayed, must consider two factors: (1) whether the store will suffer irreparable injury if a stay was denied and (2) the likelihood that the store will prevail during the judicial review. The court conceded that by denying the stay, the store would suffer irreparable injury. However, the court noted that there was little likelihood that the store would prevail during judicial review.

On June 20, 1986, the retailer's complaint was dismissed with prejudice pursuant to the stipulation of the parties. The Department of Agriculture's Office of General Counsel believes this case to be the first in the country to utilize the amended version of section 2023(a).

Barbosa v. United States, 633 F. Supp. 16, (E.D. Wis. 1986). D. J. # 147-85-17. Attorney: Nathan A. Fishbach, Assistant United States Attorney, Wisconsin, Eastern (FTS 362-1700).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6(e). The Grand Jury. Recording and Disclosure of Proceedings.

The government brought a civil antitrust suit against two companies. The companies moved for dismissal on the ground that the government violated Rule 6(e) by assigning attorneys who participated in a prior grand jury investigation of price-fixing involving these and other companies to the subsequent civil litigation without first obtaining a court order, and because the attorneys had continuously possessed grand jury documents in their personal files. The district court denied the motion on the ground that no improper disclosure had been shown. The district court next denied a clarification motion but granted limited injunctive relief, barring any disclosure of grand jury materials by counsel who participated in the grand jury to other government counsel or their assistants. After deposing five present and former government attorneys and staff members, the companies filed a renewed motion for dismissal and various kinds of alternative relief. The district court denied this motion and the companies filed an appeal.

The threshold question was whether the assignment to a civil case of the same attorneys who participated in a prior grand jury investigation constitutes disclosure of matters that occurred before the grand jury. The Court of Appeals held that it did not. For there to be a disclosure, grand jury matters must be disclosed to someone. An attorney's recollection of facts learned from his prior grand jury participation cannot be considered disclosure so as to invoke the prohibition of Rule 6(e). The civil antitrust suit brought by the government against the companies alleging an unlawful acquisition or merger is a distinct and separate action from the prior grand jury investigation of price-fixing. The court affirmed the district court's denial of the companies' motion for dismissal, or for alternative relief.

(Affirmed.)

United States v. Archer-Daniels-Midland Company, 785 F.2d 206 (8th Cir. Feb. 24, 1986).

U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Washington, D.C. 20530

MAY 30 1986

MEMORANDUM TO: All United States Attorneys

FROM: William P. Tyson
Director
Executive Office for United States Attorneys

SUBJECT: Allegations of Misconduct Against Assistant United States Attorneys

* * * DOES NOT AFFECT TITLE 10 * * *

United States Attorneys should be mindful of the requirement to report all allegations of misconduct concerning Assistant United States Attorneys and other Department employees in their offices to the Office of Professional Responsibility (OPR) pursuant to the provisions of 28 C.F.R. §0.39a and USAM 1-4.200 (2/84). This requirement extends to all complaints of misconduct, regardless of whether they appear to be without merit, are the subject of a state bar proceeding, or are part of an opinion or order issued by a judicial forum. In addition, reports should be made regarding allegations of misconduct against federal employees who are not employed in your offices where such allegations are brought to your attention. The requirement would encompass allegations regarding, for example, special agent investigators, Border Patrol agents, etc. Attached is a copy of a memorandum dated February 16, 1982, by former Attorney General Smith, which provides greater detail regarding the functions of OPR.

In order to report allegations of misconduct, please send a written report to Mr. Michael E. Shaheen, Jr., Counsel, OPR, which sets out the source of the allegation, name and position of the federal employee involved, and a summary of the circumstances surrounding the incident. A copy of the report should be forwarded at the same time to the Executive Office, with an appropriate notation that the allegation has been reported to OPR.

OPR and the Executive Office must have timely notification of all allegations so that there is time for appropriate action to be taken. If you have any questions regarding this policy, do not hesitate to contact either Mr. Michael E. Shaheen, Jr. (FTS 633-3365) or Jason P. Green, Director, Office of Legal Services (FTS 633-4024).

Attachment

LISTING OF ALL BLUESHEETS IN EFFECT
JUNE 27, 1986

AFFECTS USAM	TITLE NO.	DATE	SUBJECT
1-11.350	TITLE 1	5/06/86	Policy with Regard to Defense Requests for Jury Instruction on Immunized Witnesses
2-3.110	TITLE 2	2/03/86	Prompt Notification of Contrary Recommendations
9-1.177	TITLE 9	12/31/85	Authorization for Negotiated Concessions in Organized Crime Cases
9-2.132*	TITLE 9	12/31/85	Policy Limitations on Institution of Proceedings - Internal Security Matters
9-2.133*	TITLE 9	4/09/84	Policy Limitation on Institution of Proceedings, Consultation Prior to Institution of Criminal Charges
9-2.136	TITLE 9	6/04/86	Investigative and Prosecutive Policy for Acts of International Terrorism
9-2.151*	TITLE 9	12/31/85	Policy Limitations - Prosecutorial and Other Matters, International Matters
9-2.160	TITLE 9	7/18/85	Policy with Regard to Issuance of Subpoenas to Attorneys for Information Relating to the Representation of Clients
9-11.220 C.8.	TITLE 9	4/14/86	All Writs Act Guidelines
9-11.368(A)*	TITLE 9	2/04/86	Amendment to Rule 6(e) Federal Rules of Criminal Procedure Permitting Certain Disclosure to State and Local Law Enforcement Officials
9-20.215*	TITLE 9	2/11/86	Policy Concerning State Jurisdiction Over Certain Offenses in Indian Reservations
9-111.000*	TITLE 9	9/18/85	Policy with Regard to Forfeiture of Assets Which Have Been Transferred to Attorneys As Fees For Legal Services
9-131.030	TITLE 9	5/13/86	Consultation Prior to Consultation
9-131.110	TITLE 9	5/13/86	Hobbs Act Robbery

* Approved by Advisory Committee, being permanently incorporated.
** In printing.

LISTING OF ALL BLUESHEETS IN EFFECT
JUNE 27, 1986

AFFECTS USAM	TITLE NO.	DATE	SUBJECT
10-2.186	TITLE 10	9/27/85	Grand Jury Reporters
10-2.534*	TITLE 10	3/20/86	Compensatory Time
10-6.213*	TITLE 10	11/22/85	Reporting of Immediate Declinations of Civil Referrals
10-8.120*	TITLE 10	1/31/86	Policy Concerning Handling of Agency Debt Claim Referrals Where the Applicable Statute of Limitations has Run

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UNITED STATES ATTORNEYS' MANUAL--TRANSMITTALS

The following United States Attorneys' Manual Transmittals have been issued to date in accordance with USAM 1-1.500.

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 1	(Transmittals A2 through A10 have been superseded.)			
	A11	2/22/84	2/10/84	Complete revision of Ch. 1, 2
	A12	3/19/84	2/17/84	Complete revision of Ch. 4
	A13	3/22/84	3/9/84	Complete revision of Ch. 8
	A14	3/23/84	3/9 & 3/16/84	Complete revision of Ch. 7, 9
	A15	3/26/84	3/16/84	Complete revision of Ch. 10
	A16	8/31/84	3/02/84	Complete revision of Ch. 5
	A17	3/26/84	3/26/84	Complete revision of Ch. 6
	A18	3/27/84	3/23/84	Complete revision of Ch. 11, 13, 14, 15
	A19	3/29/84	3/23/84	Complete revision of Ch. 12
	A20	3/30/84	3/23/84	Index to Title 1, Table of Contents to Title 1

*Transmittal is currently being printed.

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 1	A21	4/17/84	3/23/84	Complete revision of Ch. 3
	A22	5/22/84	5/22/84	Revision of Ch. 1-6.200
	AAA1	5/14/84		Form AAA-1
	B1	7/01/85	8/31/85	Revision to Ch. 1-12.000
	B2	8/31/85	7/01/85	Revisions to Ch. 11
	B3	4/15/86	4/01/86	New Ch. 16
TITLE 2	(Transmittals A2 through A4 have been superseded.)			
	A5	2/10/84	1/27/84	Complete revision of Title 2- replaces all previous transmittals
	A11	3/30/84	1/27/84	Summary Table of Contents to Title 2
	AAA2	5/14/84		Form AAA-2
TITLE 3	(Transmittal A2 has been superseded.)			
	A3	10/11/83	8/4/83	Complete revision of Title 3- replaces all previous transmittals
	AAA3	5/14/84		Form AAA-3
TITLE 4	(Transmittals A2 through A6 have been superseded.)			
	A7	4/16/84	3/26/84	Complete revision of Ch. 7, 8, 12
	A8	4/16/84	3/28/84	Complete revision of Ch. 2, 14, 15
	A9	4/23/84	3/28/84	Complete revision of Ch. 3
	A10	4/16/84	3/28/84	Complete revision of Ch. 10
	A11	4/30/84	3/28/84	Complete revision of Ch. 1, 9, Index to Title 4
	A12	4/21/84	3/28/84	Complete revision of Ch. 6
	A13	4/30/84	3/28/84	Complete revision of Ch. 4
	A14	4/10/84	3/28/84	Complete revision of Ch. 13
	A15	3/28/84	3/28/84	Complete revision of Ch. 5

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 4	A16	4/23/84	3/28/84	Complete revision of Ch. 11
	AAA4	5/14/84		Form AAA-4
	B1	11/05/85	8/01/85	Revisions to Chapters 1-8, and 11-15
TITLE 5	(Transmittal A2 has been superseded.)			
	A3	3/22/84	3/5/84	Complete revision of Ch. 1, 2, 3 (was 2A)
	A4	3/28/84	3/12/84	Complete revision of Ch. 12 (was 9C)
	A4	undated	3/19/84	Complete revision of Ch. 5 (was Ch. 4), 6, 8
	A5	3/28/84	3/20/84	Complete revision of Ch. 9, 11 (was 9B)
	A6	3/28/84	3/22/84	Complete revision of Ch. 7
	A7	3/30/84	3/20/84	Complete revision of Ch. 10 (was 9A)
	A8	4/3/84	3/22 & 3/26/84	Complete revision of Ch. 13, 14, 15, Table of Contents to Title 5
	A9	12/06/84	11/01/84	Revisions to Chapter 1
	A11	4/17/84	3/28/84	Complete revision of Ch. 4 (was Ch. 3)
	A12	4/30/84	3/28/84	Index to Title 5
	AAA5	5/14/84		Form AAA-5
	B1	6/03/85	5/01/85	Revisions to Ch. 1 and Ch. 4
TITLE 6	A2	3/23/84	3/2/84	Complete revision of Title 6- replaces all prior transmittals
	A3	12/19/84	12/14/84	Revision to Ch. 4 and Index
	AAA6	5/14/84		Form AAA-6
	B1	2/14/86	10/01/85	Revisions to Chapters 1-4, 6
TITLE 7	(Transmittals A2 and A3 have been superseded.)			
	A4	1/6/84	11/22/83	Complete revision to Title 7- replaces all prior transmittals
	A12	3/3/84	12/22/83	Summary Table of Contents to Title 7

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 7	AAA7	5/14/84		Form AAA-7
	B1	3/24/86	3/05/86	Revision to Chapters 1-5
TITLE 8	AAA8	5/14/84		Form AAA-8
	B1	10/01/85	6/01/85	Complete revision to Title 8 (Supersedes A1, A2, and A12
TITLE 9	(Transmittals A5 through A12, A14, A47, A49 A50, A56 and A61 have been superseded.)			
	A13	1/26/84	1/11/84	Complete revision of Ch. 132, 133
	A14	2/10/84	1/27/84	Revisions to Ch. 1 (Superseded by A78)
	A15	2/1/84	1/27/84	Complete revision of Ch. 8
	A16	3/23/84	2/8/84	Complete revision of Ch. 135, 136
	A17	2/10/84	2/2/84	Complete revision of Ch. 39
	A18	2/3/84	2/3/84	Complete revision of Ch. 40
	A19	3/26/84	2/24/84	Complete revision of Ch. 21
	A20	3/23/84	2/8/84	Complete revision of Ch. 137, 138
	A21	3/19/84	2/13/84	Complete revision of Ch. 34
	A22	3/30/84	2/01/84	Complete revision of Ch. 14
	A23	8/31/84	2/16/84	Revisions to Ch. 2
	A24	3/23/84	2/28/84	Complete revision of Ch. 65
	A25	3/26/84	3/7/84	Complete revision of Ch. 130
	A26	3/26/84	2/8/84	Complete revision of Ch. 44
	A27	3/26/84	3/9/84	Complete revision of Ch. 90
	A28	3/29/84	3/9/84	Complete revision of Ch. 101
	A29	3/26/84	3/9/84	Complete revision of Ch. 121
	A30	3/26/84	3/19/84	Complete revision of Ch. 9
	A31	3/26/84	3/16/84	Complete revision of Ch. 78

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A32	3/29/84	3/12/84	Complete revision of Ch. 69
	A33	3/29/84	3/9/84	Complete revision of Ch. 102
	A34	3/26/84	3/14/84	Complete revision of Ch. 72
	A35	3/26/84	2/6/84	Complete revision of Ch. 37
	A36	3/26/84	2/6/84	Complete revision of Ch. 41
	A37	4/6/84	2/8/84	Complete revision of Ch. 139
	A38	3/29/84	2/28/84	Complete revision of Ch. 47
	A39	3/30/84	3/16/84	Complete revision of Ch. 104
	A40	4/6/84	3/9/84	Complete revision of Ch. 100
	A41	4/6/84	3/9/84	Complete revision of Ch. 110
	A42	3/29/84	3/14/84	Complete revision of Ch. 64
	A43	4/6/84	3/14/84	Complete revision of Ch. 120
	A44	4/5/84	3/21/84	Complete revision of Ch. 122
	A45	4/6/84	3/23/84	Complete revision of Ch. 16
	A46	2/30/84	2/16/84	Complete revision of Ch. 43
	A47	4/16/84	3/28/84	Revisions to Ch. 7 (Superseded by A63)
	A48	4/16/84	3/28/84	Complete revision of Ch. 10
	A49	4/16/84	3/28/84	Revisions to Ch. 63 (Superseded by A74)
	A50	4/16/84	3/28/84	Revisions to Ch. 66 (Superseded by A60)
	A51	4/6/84	3/28/84	Complete revision of Ch. 76, deletion of Ch. 77
	A52	4/16/84	3/30/84	Complete revision of Ch. 85
	A53	6/6/84	3/28/84	Revisions to Ch. 4
	A54	7/25/84	6/15/84	Complete revision of Ch. 11
	A55	4/23/84	4/6/84	Complete revision of Ch. 134
	A56	4/30/84	3/28/84	Revisions to Ch. 42 (Superseded by A87)

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A57	4/16/84	3/28/84	Complete revision of Ch. 60, 75
	A58	4/23/84	4/19/84	Summary Table of Contents of Title 9
	A59	4/30/84	4/16/84	Entire Index to Title 9
	A60	5/03/84	5/03/84	Complete revision of Ch. 66 (Supersedes A50)
	A61	5/03/84	4/30/84	Revisions to Ch. 1, section .103 (Superseded by A78)
	A62	12/31/84	12/28/84	Revisions to Ch. 123
	A63	5/11/84	5/9/84	Complete revision to Ch. 7 (Supersedes A47)
	A64	5/11/84	5/11/84	Revision to Ch. 64, section .400-700
	A65	5/17/84	5/17/84	Revisions to Ch. 120
	A66	5/10/84	5/8/84	Complete revision to Ch. 131
	A67	5/11/84	5/09/84	Revisions to Ch. 121, section .600
	A68	5/28/84	5/08/84	Revisions to Ch. 104
	A69	5/09/84	5/07/84	Revisions to Ch. 21, section .600
	A70	5/17/84	5/16/84	Revisions to Ch. 43, section .710
	A71	5/21/84	5/21/84	Complete revision of Ch. 20
	A72	5/25/84	5/23/84	Complete revision of Ch. 61
	A73	6/18/84	6/6/84	Complete revision of Ch. 17
	A74	6/18/84	6/7/84	Complete revision of Ch. 63 (Supersedes A49)
	A75	6/26/84	6/15/84	Complete revision of Ch. 27
	A76	6/26/84	6/15/84	Complete revision of Ch. 71
	A77	7/27/84	7/25/84	Complete revision of Ch. 6
	A78	9/10/84	8/31/84	Complete revision of Ch. 1 (Supersedes A14 and A61)

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A79	8/02/84	7/31/84	Complete revision of Ch. 18
	A80	8/03/84	8/03/84	Complete revision of Ch. 79
	A81	8/06/84	7/31/84	Revisions to Ch. 7
	A82	8/02/84	7/31/84	Revisions to Ch. 75
	A83	8/02/84	7/31/84	Revisions to Ch. 90
	A84	9/10/84	9/7/84	Complete revision of Ch. 2
	A85	7/25/84	2/17/84	Revisions to Ch. 136
	A86	8/02/84	7/31/84	Revisions to Ch. 60
	A87	11/14/84	11/09/84	Revisions to Ch. 42 (Supersedes A56)
	A88	8/31/84	8/24/84	Complete revision of Ch. 12
	A89	12/31/84	12/31/84	Complete revision of Ch. 4
	A90	10/10/84	10/01/84	Complete revision of Ch. 73
	A91	12/12/84	11/23/84	Revisions to Ch. 70
	A92	12/14/84	11/09/84	Revisions to Ch. 75
	A93	12/31/84	12/06/84	Revisions to Ch. 7
	A94	12/20/84	12/14/84	Correction to Ch. 27
	AAA9	5/14/84		Form AAA-9
	B1	3/15/85	01/31/85	Revisions to Ch. 60
	B2	3/29/85	01/31/85	Revisions to Ch. 61
	B3	3/29/85	01/31/85	Revisions to Ch. 71
	B4	6/24/85	4/01/85	Revisions to Ch. 63
	B5	6/24/85	4/04/85	Revisions to Ch. 11
	B6	6/27/85	4/01/85	Revisions to Ch. 139
	B7	6/27/85	5/01/85	Revisions to Ch. 12
	B8	7/01/85	4/01/85	Revision to Ch. 4

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	B9	7/31/85	7/31/85	Revision to Ch. 130
	B11	9/27/85	7/01/85	Revision to Ch. 27 and Ch. 38
	B12	9/27/85	7/01/85	Revision to Ch. 2
	B13	10/01/85	7/01/85	Revision to Ch. 60
	B14	11/29/85	8/01/85	Revision to Ch. 2
	B15	10/21/85	7/01/85	Revision to Ch. 75
	B16	10/22/85	7/01/85	Revision to Ch. 64
	B17	10/21/85	8/30/85	Revision to Ch. 136
	B18	10/21/85	8/01/85	Revision to Ch. 63
	B19	11/05/85	8/01/85	Revision to Ch. 133
	B20	11/01/85	8/30/85	Revision to Ch. 134
	B21	11/05/85	8/01/85	Revision to Ch. 11
	B22	11/01/85	8/01/85	Revision to Ch. 61
	B23	11/20/85	11/05/85	Revision to Ch. 71
	B24	11/20/85	11/05/85	Revision to Ch. 46
	B25	11/01/85	8/01/85	Revision to Ch. 90
	B26	11/29/85	8/01/85	Revision to Ch. 138
	B27	11/01/85	8/01/85	Revision to Ch. 48
	B28	11/29/85	8/01/85	Revision to Ch. 65
	B29	11/01/85	11/05/85	Revision to Ch. 103
	B30	11/29/85	11/05/85	Revision to Ch. 49
	B31	11/01/85	8/01/85	Revision to Ch. 7
	B32	12/01/85	8/01/85	Revision to Ch. 40
	B33	11/01/85	8/01/85	Revision to Ch. 69
	B34	02/14/86	12/31/85	Revision to Ch. 20

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	B35	12/31/85	8/01/85	Revision to Ch. 132
	B36	11/29/85	8/01/85	Revision to Ch. 110
	B37	02/12/86	11/05/85	Revision to Ch. 8
	B38	3/20/86	12/31/85	Revision to Ch. 18
	B39	11/29/85	11/05/85	Revision to Ch. 60
	B40	02/12/86	11/05/85	Revision to Ch. 34
	B43	04/08/86	3/01/86	Revision to Ch.6
	B45	04/08/86	3/01/86	Revision to Ch. 21
	B46	02/14/86	12/31/85	Revision to Ch. 42
	B47	04/08/86	3/01/86	Revision to Ch. 60
TITLE 10	(Transmittal A2 through A7 have been superseded.)			
	A8	4/5/84	3/24/84	Complete revision of Ch. 1
	A9	4/6/84	3/20/84	Complete revision of Ch. 7
	A10	4/13/84	3/20/84	Complete revision of Ch. 5
	A11	3/29/84	3/24/84	Complete revision of Ch. 6
	A12	4/3/84	3/24/84	Complete revision of Ch. 8
	A13	9/4/84	3/26/84	Complete revision of Ch. 10
	A14	4/23/84	3/28/84	Complete revision of Ch. 4
	A15	4/17/84	3/28/84	Complete revision of Ch. 3, 9
	A16	5/4/84	3/28/84	Index and Appendix to Title 10
	A17	3/30/84	3/28/84	Summary Table of Contents to Title 10
	A18	5/4/84	4/13/84	Complete revision to Ch. 2
	A19	5/02/84	5/01/84	Revisions to Ch. 4
	A20	8/31/84	5/24/84 & 7/31/84	Revisions to Ch. 2
	A21	6/6/84	5/1/84	Corrected TOC, Ch. 4 and pages 23, 24

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 10	A22	7/30/84	7/27/84	Revision to Ch. 2
	A23	8/02/84	7/31/84	Revision to Ch. 2
	A24	11/09/84	10/19/84	Revision to Ch. 2
	A25	11/09/84	10/19/84	Revision to Ch. 2
	A26	11/28/84	11/28/84	Revision to Ch. 2
	A27	12/07/84	11/01/84	Revision to Ch. 2
	AAA10	5/14/84		Form AAA-10
	B1	3/15/85	1/31/85	Revision to Ch. 2
	B2	5/31/85	5/01/85	Revision to Ch. 2
	B3	6/27/85	4/01/85	Revision to Ch. 2
	B4	7/23/85	4/01/85	Revision to Ch. 4
	B5	02/20/86	01/27/86	Revision to Ch. 3
	B7	7/31/85	5/01/85	Revision to Ch. 2 Appendix--Form Index
	B8	11/01/85	8/16/85	Revisions to Ch. 2 and Ch. 8
	B9	11/01/85	8/16/85	Revision to Ch. 2
	B10	11/29/85	8/21/85	Revision to Ch. 2
	B11	11/29/85	8/16/85	Revision to Ch. 2
	B12	11/29/85	8/01/85	Revision to Ch. 2
	B14	11/29/85	8/01/85	Revision to Ch. 2
	B15	01/14/86	12/17/85	Revision to Ch. 2
	B17	03/01/86	12/31/85	Revision to Ch. 7
	B19	03/20/86	12/31/85	Revision to Ch. 5
	B21	04/15/86	04/01/86	Revision to Ch. 3
TITLE 1-10	A1	4/25/84	4/20/84	Index to USAM

If you have any questions regarding the above, please contact Judy Beeman at FTS 673-6348.

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William P. Tyson, Director

Editor-in-Chief: Jason P. Green FTS 633-4024
Editor: Judith C. Campbell FTS 673-6348

TABLE OF CONTENTS

Page

COMMENDATIONS 233

CLEARINGHOUSE
- Legal/Policy Advisories on Asset Forfeiture Matters 235

POINTS TO REMEMBER
- Forfeiture and Abandoned Property Manual 236
- Personnel 236
- United States Attorneys and United States Marshals Advised to Work Together To Avoid Problems Relating to Seized and Forfeited Property 236

CASENOTES
- OFFICE OF THE SOLICITOR GENERAL 237
- CIVIL DIVISION 237
- LAND AND NATURAL RESOURCES DIVISION 245
- UNITED STATES ATTORNEYS' OFFICES 249

APPENDIX
- Cumulative List of Changing Federal Civil Postjudgment Interest Rates .. 250
- United States Attorneys' List 251

VOL. 34, NO. 10 THIRTY-THIRD YEAR AUGUST 15, 1986

Please send change of address to Editor, United States Attorneys' Bulletin, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

J31.12:

COMMENDATIONS

The following Assistant United States Attorneys have been commended:

J. MATTHEW CAIN (Ohio, Northern) by Special Agent-in-Charge Joseph E. Griffin, Federal Bureau of Investigation, for his successful prosecution of a Wells Fargo robbery case.

RICHARD N. COX (Illinois, Central) by Special Agent-in-Charge Philip V. Fisher, Drug Enforcement Administration, for his presentation on the Controlled Substances Act at a DEA Law Enforcement Seminar, May 14, 1986.

D. MICHAEL CRITES (Ohio, Southern) by Special Agent-in-Charge Terence D. Dinan, Federal Bureau of Investigation, for his successful prosecution of a drug case.

JEANNE K. DAMIRGIAN (Pennsylvania, Eastern) by Attorney General Edwin Meese III for her successful prosecution of a major drug dealer.

DALE A. GOLDBERG (Ohio, Southern) by Director Alan G. Harper, Veterans Administration Medical Center, for her successful conclusion of an EEO complaint against the Center.

MEL SCOTT JOHNSON (Wisconsin, Eastern) by Inspector General Paul A. Adams, Department of Housing and Urban Development, for his outstanding contributions to the successful investigation of HUD's single family mortgage program.

DANIEL G. KNAUSS, DAVID R. RAMAGE-WHITE, WILLIAM R. STEVENS, JR., and JOHN MCCARTHY ROLL (Arizona) by Special Agent-in-Charge Herbert H. Hawkins, Jr., Federal Bureau of Investigation, for their participation in the Moot Court Training Session for FBI agents in Tucson, Arizona.

KRIS ALLEN MCLEAN (Montana) by District Counsel Michael D. Thompson, Veterans Administration, for his successful representation in a tort claims case.

EMILY BENNETT METZGER (Kansas) by Special Agent-in-Charge Kenneth G. Cloud, Drug Enforcement Administration, for her successful prosecution of a drug distribution case.

ALAN I. MISHAEL (Florida, Southern) by Director William H. Webster, Federal Bureau of Investigation, for his invaluable efforts in arranging forfeiture to the government of an aircraft seized in connection with a narcotics case.

FRANKLIN L. NOEL (Minnesota) by Special Agent-in-Charge Thomas A. Pabst, United States Secret Service, for his work in a complex tele-marketing credit card fraud case.

ROBERT A. PALLEMON (California, Central) by Special Agent-in-Charge Richard T. Bretzing, Federal Bureau of Investigation, for his successful prosecution of a conspiracy, interstate commerce violations, and possession of an unregistered firearm case.

JOHN F. PANISZCZYN (Texas, Western) by District Counsel Richard J. Jones, Veterans Administration, for his diligent efforts in a Federal Tort Claims Act case.

KAREN LEE PATTERSON (California, Eastern) by Colonel Wayne J. Scholl, Corps of Engineers, Department of the Army, for her successful representation of the Corps in a case involving Section 404 of the Clean Water Act.

STEPHEN D. PETERSEN (California, Central) by Regional Counsel Paul E. Wilson, United States Customs Service, for his excellent work in a forfeiture case.

JOHN F. PEYTON, JR. and Special Assistant United States Attorney THOMAS LEDVINA (Hawaii) by Associate Attorney General Arnold I. Burns for their outstanding lawyering in litigation involving President Marcos and his party.

ROBERT H. PLAXICO (California, Southern) by Deputy Chief United States Probation Officer Martha J. Crockett, United States District Court, for his presentation on liability issues at a training session for probation officers.

STEVE PREISSER and MIKE MOORE (Florida, Northern) by Special Agent-in-Charge Gary Wright, United States Customs Service, for their participation in the successful prosecution of an export licensing law violations case.

CARYL PENNEY PRIVETT (Alabama, Northern) by the Food and Drug Administration to receive the Commissioner's Special Citation in recognition of her exceptional legal skill, commitment and cooperation in enforcement litigation.

ROBERT E. RAWLINS (Kentucky, Eastern) by Special Agent-in-Charge Joel A. Carlson, Federal Bureau of Investigation, for his successful prosecution of a gambling case.

THOMAS J. RUETER (Pennsylvania, Eastern) by Chief C. Michael Daley, Criminal Investigation Division, Internal Revenue Service, for his prosecution of a tax case.

RICHARD L. SCHEFF (Pennsylvania, Eastern) by Special Agent-in-Charge David E. Warren, United States Customs Service, for his prosecution of child pornography cases.

S. DAVID SCHILLER (Virginia, Eastern) by United States Trustee William C. White, District of Columbia and Eastern Virginia, for his superb work in a bankruptcy case.

MARK P. SCHNAPP (Florida, Southern) by Director William H. Webster, Federal Bureau of Investigation, for his part in the prosecution of a major bank fraud and embezzlement case.

RICHARD M. SCHWARTZ (New York, Southern) by General Counsel Daniel R. Levinson, United States Consumer Product Safety Commission, for his excellent representation in a Federal Tort Claims Act case.

PAUL L. SEAVE (California, Central) by Assistant Special Agent-in-Charge Al Dovetko, Drug Enforcement Administration, for his successful prosecution of a drug case.

RICHARD J. STOUT (Pennsylvania, Eastern) by Assistant General Counsel Ann C. Wilson, Office of Personnel Management, for his representation in an accident case involving a SEPTA bus and a government vehicle.

DAVID TITMAN (Louisiana, Western) by Acting General Counsel Spence W. Perry, Federal Emergency Management Agency, for his continuous excellent performance in representing FEMA in flood insurance cases.

PETER JOSEPH TOMAO (New York, Eastern) by Inspector General Paul A. Adams, Department of Housing and Urban Development, for his outstanding work in a fraud case.

MARIANNE K. TOMECEK (Texas, Southern) by Regional Attorney W. J. Weltler, Department of Agriculture, for her admirable performance in a complex case involving a plenary casualty loss action, a Chapter 11 bankruptcy, an adversary proceeding contesting a warehouse facility sale, a federal storage contract and performance bond, the formation of a new warehouse entity and other agreements.

D. PAUL VERNIER, JR. (Guam) by Officer-in-Charge James M. Bailey, Immigration and Naturalization Service, for his outstanding dedication, professionalism and service to INS.

CATHERINE L. VOTAW (Pennsylvania, Eastern) by Major General Mark J. Sisinyak, Department of the Army, for her representation of a civil case against the Army's procurement of a Liquid Incinerator for the Johnston Atoll Chemical Agent Disposal System.

JACKIE N. WILLIAMS (Kansas) by Special Agent-in-Charge Robert B. Davenport, Federal Bureau of Investigation, for his successful prosecution of a drug case.

Organized Crime Strike Force Attorneys RICHARD J. MARIEN, LLOYD B. MONROE, JR., and A. MARY STERLING (Kansas) were commended by Director William H. Webster, Federal Bureau of Investigation, for their outstanding work in a casino skimming case.

CLEARINGHOUSE

Legal/Policy Advisories on Asset Forfeiture Matters

The Asset Forfeiture Office of the Criminal Division prepares advisories on numerous legal/policy issues each month in the course of their regular duties.

A copy of the following advisories may be obtained by contacting the Office of Legal Services, Executive Office for United States Attorneys, at FTS 633-4024.

L86-4 Guidelines for Release of Seized and Forfeited Property to State and Local Law Enforcement Agencies, 51 Fed. Reg. 6608 (Feb. 25, 1986).

L86-5 June 25, 1986, memorandum from D. Lowell Jensen to all United States Attorneys regarding "Anticipating and Avoiding Problems Relating to the Management and Disposition of Seized and Forfeited Assets."

Please request item number CH-37.

(Executive Office)

POINTS TO REMEMBER

Forfeiture and Abandoned Property Manual

The Legal Counsel and the Administrative Services Divisions of the Federal Bureau of Investigation (FBI) have prepared the Forfeiture and Abandoned Property Manual (dated July 1986).

The Manual, which includes the new forfeiture provisions of the "Comprehensive Crime Control Act of 1984" enacted on October 12, 1984, explains forfeiture procedures pursuant to statutes enforced by the FBI permitting civil forfeiture. In addition, the Manual delegates responsibility for different aspects of the civil forfeiture process and sets forth FBI policy. The Manual replaces the 1984 manual, "Civil Forfeiture Under the Controlled Substances Act," and is for official use only.

On July 21 and 22, 1986, a copy of the Manual was mailed to each United States Attorney's office, Attention: Asset Forfeiture Contact.

(Executive Office)

Personnel

Effective July 14, 1986, P. Raymond Lamonica was court-appointed United States Attorney for the Middle District of Louisiana.

Effective July 16, 1986, Robert L. Teig was court-appointed United States Attorney for the Northern District of Iowa.

(Executive Office)

United States Attorneys and United States Marshals Are Advised To Work Together To Avoid Problems Relating to Seized and Forfeited Property

By memorandum of June 25, 1986, to all United States Attorneys, Deputy Attorney General D. Lowell Jensen urged United States Attorneys' and United States Marshals' personnel to "coordinate their efforts and devote the requisite time and attention to the [forfeiture] case." Forfeiture, a relatively new area of law, was described in the memorandum as a powerful and effective tool in the [government's] fight against organized crime and drug trafficking. It empowers the government to remove the proceeds of crime from individual defendants and to destroy the economic power of drug trafficking organizations. However, it must be used fairly, honestly, efficiently, and justly.

To meet this objective, Mr. Jensen has established guidelines "which must be observed in order to help minimize or avoid the possibility that the government will assume unnecessary difficult or insurmountable problems in the management and disposition of seized assets."

A copy of the memorandum is available through the Office of Legal Services, see "Legal/Policy Advisories on Asset Forfeiture Matters," in this issue of the Bulletin.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A brief amicus curiae in Connecticut v. Barrett, 495 A.2d 1044 (1985). The issue is whether a defendant who makes a voluntary oral statement invokes his Miranda rights by an equivocal reference to his attorney.

A brief amicus curiae in Richardson v. Marsh, 781 F.2d 1201 (6th Cir. 1986). The question presented is whether the rule in Bruton v. United States, 391 U.S. 123 (1968), should apply to codefendant statements that do not expressly mention the defendant but which do, when linked with other evidence in the case, furnish incriminating evidence against the defendant at a joint trial.

A petition for certiorari in Ellender v. Heckler, No. 85-6274 (2d Cir. 1986). The questions presented are (1) whether the district court's judgment was "final" for purposes of supporting appellate court jurisdiction under 28 U.S.C. §1291; and (2) whether that judgment satisfied the requirements of Federal Rules of Civil Procedure 58 so as to set the time for appeal running.

CIVIL DIVISION

SUPREME COURT HOLDS THAT ENHANCEMENT OF TITLE VII ATTORNEYS FEE AWARD TO COMPENSATE FOR DELAY IN PAYMENT CONSTITUTES AN AWARD OF INTEREST PROHIBITED BY SOVEREIGN IMMUNITY.

The Supreme Court reversed a ruling by the D.C. Circuit which allowed a 30 percent enhancement of a Title VII attorneys fee award against the government, because of the delay that occurred between the rendering of the services and the payment of the fee. The Court held that enhancement for delay amounted to the imposition of interest against the United States and that Congress had not expressly waived the government's traditional immunity from interest in Title VII. Specifically, the Court rejected the view that by making the United States liable "the same as a private person" or by mandating the award of "reasonable" attorneys fees, Congress acted unambiguously enough to render the government liable for interest here.

The Court's categorical rejection of delay as a proper basis for enhancement of a Title VII award should also lead to reversal of cases authorizing use of "current" rates rather than historical rates to compensate for delay. For instance, Shultz v. Palmer, which raised that issue, was vacated and remanded for further consideration in light of Shaw.

> Library of Congress v. Shaw, ___ U.S. ___, No. 85-54, (July 1, 1986). D. J. # 35-16-1320. Attorneys: William Kanter (FTS 633-1597) and Al J. Daniel (FTS 633-3518), Civil Division; argued by Charles Rothfeld (FTS 633-5638), Office of the Solicitor General.

SUPREME COURT HOLDS THAT FAMILY HOUSEHOLD UNIT PROVISION OF FOOD STAMP ACT DOES NOT INFRINGE ON CONSTITUTIONALLY PROTECTED FAMILY RIGHTS.

In 1981 and 1982, Congress amended the Food Stamp Act, 7 U.S.C. §2012(i), to require that parents, children and siblings residing together be treated as a single unit for purposes of the Act, regardless of whether they actually eat together; the Act had contained no such limitation previously, and unrelated individuals residing together but eating separately continued to be eligible for separate household status. Plaintiffs thereafter brought this action alleging that 7 U.S.C. §2012(i) impermissibly discriminates against related individuals who choose to reside together, and infringes protected family rights. The district court applied heightened scrutiny to plaintiffs' claim and held the statute unconstitutional.

On direct appeal pursuant to 28 U.S.C. §1252, the Supreme Court reversed. The Court agreed with the government's argument that the case involves neither fundamental rights nor suspect or quasi-suspect classifications, and that the government was not directly interfering with family living arrangements. Accordingly, the Court held that only "rational basis" scrutiny was appropriate, and that the statute was a legitimate and reasonable measure aimed at preventing fraud and abuse in the multibillion dollar Food Stamp program.

> Lyng v. Castillo, ___ U.S. ___, No. 85-250 (June 27, 1986). D. J. # 147-74-16. Attorneys: Robert S. Greenspan (FTS 633-5428) and John S. Koppel (FTS 633-5460), Civil Division.

SUPREME COURT AFFIRMS JUDGMENT AWARDING FEES IN AN AMOUNT SEVERAL TIMES GREATER THAN THE DAMAGES RECOVERED IN THE UNDERLYING CIVIL RIGHTS CASE ON THE MERITS.

Eight individuals brought a civil rights action under 42 U.S.C. §1983 against the City of Riverside and several of its police officers in connection with an incident involving the officers' disruption of a party in two of the individuals' homes. After many years of litigation, the plaintiffs ultimately won a jury verdict of $33,350 against the City and a few police officers. No injunctive relief was issued. Plaintiffs then filed for attorney's fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, and was awarded $245,456.25 for their litigative efforts. The court of appeals affirmed. The Supreme Court, however, vacated and remanded the award for further consideration in light of Hensley v. Eckerhart, 461 U.S. 424 (1983). On remand, the district court issued the same award, and the court of appeals once again affirmed.

In a plurality opinion, the Court affirmed the attorney's fees judgment; but rejected the view that a civil rights fee award need necessarily bear any proportion to the underlying damage judgment, since a civil rights suit may vindicate broader, public rights that go beyond an individual's personal recovery. Justice Powell, although troubled by the disproportionality of the award, concurred, but added the observation that no rule of proportionality governed the fee award in such cases. Justice Rehnquist, joined by three other dissenters, argued that the award plainly was disproportionately large, was arrived at in a manner inconsistent with the principles of Hensley, and should be reversed and remanded for recomputation.

City of Riverside v. Rivera, ___U.S.___, No. 85-224 (June 27, 1986). D. J. # 157-12C-3076. Attorneys: William Kanter (FTS 633-1597) and Michael Jay Singer (FTS 633-4815), Civil Division.

SUPREME COURT HOLDS THAT COMPENSATORY DAMAGES FOR VIOLATION OF CONSTITUTIONAL RIGHTS ARE TO BE BASED ON ACTUAL INJURY SUFFERED RATHER THAN ANY ABSTRACT INHERENT VALUATION OF THE RIGHT INVOLVED.

The Supreme Court has resolved a conflict among the circuits regarding the standard that governs damages awards for deprivations of constitutional rights. The issue arose in an action by a teacher who had been suspended, without a presuspension hearing, for allegedly using improper teaching methods. Although respondent continued to receive pay throughout the period of suspension and later was reinstated to his duties, the jury awarded him over a quarter of a million dollars. The instructions to the jury permitted it to place some intrinsic value on respondent's constitutional rights, without regard to his actual injury or petitioners' responsibility for that injury. Because this issue also arises in suits against federal officials, the Solicitor General authorized the government's participation as amicus. The government urged that damages awards for constitutional deprivations should be guided by compensatory principles rather than abstract notions of the value of constitutional rights, and the Supreme Court agreed. Reaffirming its earlier decision in Carey v. Piphus, 435 U.S. 247 (1978) (which respondent urged should be limited to "procedural" rather than "substantive" constitutional rights), the Court held that "no compensatory damages could be awarded . . . absent proof of actual injury" (slip op. 9 (emphasis in original)). Otherwise, according to the Court, "juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants" (id. at 11).

Memphis Community Schools v. Stachura, ___U.S.___, No. 85-410 (June 25, 1986). D. J. # 145-0-1804. Attorneys: Barbara L. Herwig (FTS 633-5425) and Larry L. Gregg (FTS 724-6732), Civil Division.

SUPREME COURT BACKS UAW'S RIGHT TO CHALLENGE LABOR DEPARTMENT HANDBOOK AND AFFIRMS ASSOCIATIONAL STANDING DOCTRINE.

Eleven members of the UAW and the union itself filed this action claiming wrongful denial of benefits under the Trade Act of 1974, 19 U.S.C. §2101, et seq. Even though under the Act benefit decisions are made by "cooperating state agencies," plaintiffs sued only the Secretary of Labor. The district court agreed with plaintiffs that a Department of Labor interpretative handbook misrepresented the Trade Act's provisions prior to 1981, and ordered the Secretary of Labor to "direct" all state agencies to reprocess all benefit claims denied in reliance upon the handbook. The D.C. Circuit reversed, holding that the UAW lacked standing since it had alleged no injury to itself or its membership's associational rights. It also held that the individual claims should be dismissed because of the failure to join the state agencies as parties.

The Supreme Court reversed, holding that the UAW has standing and that state agencies do not have to be parties since the agencies will without doubt obey any directive from the Secretary of Labor that he is ordered to promulgate. However, the Court left the D. C. Circuit to decide what will happen if a state is ordered by Labor to reprocess applications for benefits which cannot be reviewed under the applicable state's administrative law.

The Court asserted further that associations make valuable plaintiffs due to their "pre-existing reservoir of expertise and capital," and "a judgment won against [the association] might not preclude subsequent claims" by the members. The four dissenting justices, while differing with the majority's decision to remand the case for a decision on the merits, did not support changing the associational standing doctrine.

International Union, UAW v. Brock, ___ U.S. ___, No. 84-1777 (June 25, 1986). D. J. # 102-2242. Attorneys: Leonard Schaitman (FTS 633-3441) and William G. Cole (FTS 633-2786), Civil Division; argued by Carolyn B. Kuhl of the Solicitor General's Office).

SUPREME COURT RULES THAT "HOSTILE ENVIRONMENT" SEXUAL HARASSMENT CONSTITUTES A VIOLATION OF TITLE VII, BUT SIGNALS LIMITATIONS ON EMPLOYERS' IMPUTED LIABILITY.

Respondent, a former employee of the petitioner bank, filed a Title VII action alleging that her supervisor had subjected her to sexual harassment. The district court granted judgment for the bank, based on its findings that respondent's promotions at the bank had been based on merit and that any sexual relationship between respondent and her supervisor had been voluntary. The D.C. Circuit reversed and remanded, holding that even if respondent had failed to show that she had lost tangible job benefits, she may have made out a Title VII claim based on her supervisor's creation of a discriminatory hostile working environment. It also held that the employer would be strictly liable for any acts of harassment by the supervisor, regardless of its lack of notice, and that evidence regarding respondent's provocative dress and talk had "no place" in such litigation.

The Supreme Court, while affirming the court of appeals' remand order, confirmed that hostile environment harassment can form the basis for a Title VII claim, pointing out that the lower courts had applied this principle to race, religion, and national origin as well as sex. However, the Court made clear that all relevant evidence, including that ruled inadmissible by the court of appeals, must be considered. The Court declined to "issue a definitive rule" on the imputed liability issue, holding that the lack of full factual findings or a final resolution of the issue of liability precluded such a ruling.

Meritor Savings Bank, FSB v. Vinson, ___ U.S. ___, No. 84-1979 (June 19, 1986). D. J. # 145-0-1800. Attorneys: John F. Cordes (FTS 633-3380) and John F. Daly (FTS 633-3688), Civil Division.

SUPREME COURT RULES ON FIRST AMENDMENT CHALLENGE TO SOCIAL SECURITY NUMBERS.

The Supreme Court issued a split decision reversing, on direct appeal, a district court decision barring the Secretary of Health and Human Services from using and disseminating a Social Security number issued in the name of a child whose parents applied for AFDC benefits but initially objected on religious grounds to their obtaining a Social Security number. The district court also barred HHS from denying benefits because of the parents' refusal to supply a Social Security number.

A clear majority of the Supreme Court held that the First Amendment cannot dictate the conduct of the government's internal procedures when the government had in fact ultimately obtained a number for the child. The Court split on the more difficult question of whether the First Amendment protected the parents' initial refusal to supply a number: two Justices believed this issue was moot; three Justices supported HHS's position that there was no First Amendment violation; and four Justices supported plaintiffs' position that there was a First Amendment violation; in dictum, Justice Blackmun agreed with plaintiffs' views "on the facts as determined by the District Court." Because of the combination of votes on the broader question, the judgment below was reversed and remanded.

Bowen v. Roy, ___U.S.___, No. 84-780 (June 11, 1986). D. J. # 145-16-2361. Attorneys: Leonard Schaitman (FTS 633-3441) and Peter R. Maier, FTS 633-4052), Civil Division.

SUPREME COURT HOLDS THAT STATUTORY AND REGULATORY ISSUES ARISING IN SECRETARY OF HHS' ADMINISTRATION OF THE PART B MEDICARE PROGRAM ARE SUBJECT TO JUDICIAL REVIEW.

This case involves the question whether Congress has precluded judicial review of procedural and statutory claims arising under Part B of the Medicare Act. In United States v. Erika, Inc., 456 U.S. 201 (1982), the Supreme Court held that Congress had foreclosed review of benefit determinations, and in Heckler v. Ringer, 466 U.S. 602 (1984), the Court apparently extended that holding to include review of the Secretary's method of making those benefit determinations. In light of those decisions and a favorable decision in the Fourth Circuit, Starnes v. Schweiker, 748 F.2d 217 (4th Cir. 1984), cert. denied, 105 S. Ct. 2022 (1985), the government petitioned for certiorari from the adverse ruling in the Sixth Circuit.

The Supreme Court affirmed, reiterating the "strong presumption that Congress intends judicial review of administrative action." According to the Court, the legislative history of the Part B provisions revealed only a general intent to preclude review of claim calculations, not necessarily rules and regulations which affected those determinations. The Court stated that irrespective of the discussion of the Part B Program in Ringer, its holding in Erika was never meant to extend beyond purely ministerial calculations of benefit determinations.

Bowen v. Michigan Academy of Family Physicians, ___ U.S. ___, No. 85-225 (June 9, 1986). D. J. # 145-16-1033. Attorneys: Anthony J. Steinmeyer (FTS 633-3388) and Harold J. Krent (FTS 633-3159), Civil Division.

FIFTH CIRCUIT HOLDS THAT UNDER THE CIVIL SERVICE REFORM ACT OF 1978 THERE IS NO JUDICIAL REVIEW OF EMPLOYEE RECLASSIFICATION CLAIMS.

Plaintiff, a GS-14 attorney, sought judicial review of OPM's denial of his claim that his position should be reclassified at the GS-15 level. The district court rejected the government's argument that reclassification claims are not subject to judicial review under the Civil Service Reform Act (CSRA), and held that OPM's denial of plaintiff's claim had been arbitrary and capricious. Accordingly, it ordered OPM to promote plaintiff, but denied plaintiff's application for attorney's fees under the EAJA.

On appeal, the Fifth Circuit reversed on the merits. It agreed that there is no judicial review of minor personnel matters such as reclassification claims under the CSRA, and held that plaintiff's sole remedy under the Act is a "prohibited personnel practice" claim to the Office of Special Counsel of the Merit Systems Protection Board. Although plaintiff had also raised an equal protection claim which the district court had not reached, the court found that this claim lacked in merit and remand to the district court was not required. Finally, since plaintiff is no longer a "prevailing party," the court held that he is not eligible for fees under the EAJA.

Towers v. Horner, ___ F.2d ___, Nos. 85-3001 and 3172 (5th Cir. June 18, 1986). D. J. # 145-156-378. Attorneys: William Kanter (FTS 633-1597) and John S. Koppel (FTS 633-5450), Civil Division.

EIGHTH CIRCUIT WITHDRAWS OPINION HOLDING THAT AGENCY ACTION FOUND TO BE UNSUPPORTED BY SUBSTANTIAL EVIDENCE IS PRESUMPTIVELY UNJUSTIFIED WITHIN THE MEANING OF THE EAJA.

In granting an unopposed fee application under the Equal Access to Justice Act (EAJA), the court of appeals held that the recent amendments to the EAJA changed the standard for determining the "substantial justification" of the government's position under 28 U.S.C. §2412(d). It ruled that Congress intended to change the standard from one of "reasonableness" to one where the position of the United States is presumptively unjustified once the underlying action has been found to be unsupported by substantial evidence in the record. Because of the importance of this issue to EAJA litigation, and because of the belief that the panel overlooked critical indicia of legislative history, the government moved the court to withdraw its opinion.

The government's motion acknowledged that the House Report on the EAJA amendments contained language to the effect that agency action found to be unsupported by substantial evidence was presumptively unjustified under the new Act; but it pointed out that this language was expressly disavowed by the bill's sponsors on the floor of the House, that Senate leaders had similarly taken exception to the language, and more importantly, that the President in signing the bill had indicated understanding that "the substantial justification standard is a different standard, and an easier one to meet than either the arbitrary and capricious or substantial evidence standard." The court granted the government's motion and withdrew its opinion.

Peterson v. United States Railroad Retirement Board, ___F.2d___, No. 85-5062 (8th Cir. May 1, 1986). D. J. # 124-39-21. Attorneys: William Kanter (FTS 633-1597) and Harold J. Krent (FTS 633-3159), Civil Division.

TENTH CIRCUIT UPHOLDS PLAIN MEANING AND CONSTITUTIONALITY OF FEDERAL UNEMPLOYMENT TAX ACT REQUIREMENT FOR REDUCTION OF UNEMPLOYMENT BENEFITS BY THE AMOUNT OF SOCIAL SECURITY RETIREMENT BENEFITS.

Social Security recipients in Colorado challenged that State's implementation of a Labor Department interpretation of the Federal Unemployment Tax Act requiring that unemployment benefits must be reduced by the amount of any Social Security pension benefits, but need not be reduced in the case of most private pensions. The district court rejected this interpretation on the basis of legislative history, and also on equal protection grounds, and enjoined Colorado from complying with DOL's interpretation. DOL participated as amicus in Colorado's appeal.

Reversing the district court, the court of appeals accepted the argument already endorsed by three other circuits that the plain meaning of the statute required the challenged offset, and precluded construction of a contrary meaning from legislative history. In addition, the court held that offsetting unemployment benefits by Social Security pensions, but not by private pensions in most circumstances, was rationally related to saving of public funds and ease of administration.

Edwards v. Valdez, Director, Colorado Dept. of Labor, ___F.2d___, Nos. 85-1552, 85-1650 (10th Cir. May 5, 1986). D. J. # 145-10-2574. Attorneys: Michael Kimmel (FTS 633-5714), Civil Division; and Bette Briggs (FTS 523-8247), Department of Labor.

ELEVENTH CIRCUIT RULES THAT APPEALS COUNCIL HAS COMPLETE AUTHORITY UNDER EXISTING REGULATIONS TO REVIEW AND REVERSE ANY ALJ DECISION IN SOCIAL SECURITY DISABILITY CASES.

The Eleventh Circuit in an *en banc* decision vacated its panel's decision and reaffirmed the authority of the Secretary (through the Appeals Council) under his regulations to review any Administrative Law Judge (ALJ) decision in Social Security Disability cases. It also reaffirmed the administrative law principle that when an agency is the final decision-maker, it is the final decision of the agency that is reviewed and not the decision of any of the intermediate decision-makers who render decisions along the way.

Parker v. Bowen and *Hand v. Bowen*, ___ F.2d ___, Nos. 84-7678, 84-8630 (11th Cir. May 13, 1986) (*en banc*). D. J. # 137-1-1177. Attorneys: William Kanter (FTS 633-1597) and Howard S. Scher (FTS 633-4820), Civil Division.

ELEVENTH CIRCUIT REVERSES DISTRICT COURT DECISION AND HOLDS THAT A HOSPITAL MUST EXHAUST ITS ADMINISTRATIVE REMEDIES BEFORE THE PROVIDER REIMBURSEMENT REVIEW BOARD UNDER 42 U.S.C. §139500(A)(1)(A)(I) BEFORE OBTAINING JUDICIAL REVIEW OF ITS MEDICARE REIMBURSEMENT RATE UNDER THE NEW PROSPECTIVE PAYMENT SYSTEM.

In 1983, Congress changed the reimbursement method to hospitals for services they provide to Medicare beneficiaries. Under the old system, hospitals received the "reasonable cost" of the services provided. Under the new Prospective Payment System, the Secretary sets rates in advance of the provision of services for each category of illness. These rates apply no matter what costs the hospitals incur; hospitals are thus encouraged to cut costs.

In a number of cases, hospitals have sought review of the Secretary's reimbursement rates. The Secretary's regulations construe the Medicare Act as providing for administrative and judicial review only after the issuance of a final decision by the Secretary (a "Notice of Program Reimbursement") on the amount of payment due to a hospital for any given cost year. However, hospitals have sought immediate review, arguing that the Secretary's regulations establish a kind of Catch-22: that is, that the regulations force hospitals to wait until the end of their cost year to obtain review of a reimbursement rate, but that other regulations provide that only prospective relief (*i.e.*, relief from the point of review forward) is available upon that review. Review, according to the hospitals' arguments, is therefore deprived of much of its meaning. The district court's decision, one of thirteen consecutive losses for the government on this issue, allowed the hospital to seek early review.

The Eleventh Circuit reversed, accepting the government's argument that the prospective relief regulations apply only in certain, limited situations; and that hospitals will not be prejudiced by following the scheme of review, since the Secretary's regulations allow hospitals to recover full, retroactive relief if they can establish an entitlement to such relief. Thus, for hospitals invoking the jurisdiction of the court under 42 U.S.C. §1395oo(a)(1)(A)(i), judicial review must await the issuance of the Secretary's Notice of Program Reimbursement.

On the ground that the hospital in this case had requested the district court to review its PPS rate under §1395oo(a)(1)(A)(i) only, the Court declined to decide whether a Notice of Program Reimbursement is also a condition precedent for review under 42 U.S.C. §1395oo(a)(1)(A)(ii), that portion of the Medicare statute that provides for review of issues arising under the Prospective Payment System. However, the court's ruling on the potential Catch-22 issue would appear to deprive hospitals of any meaningful basis upon which to challenge the Secretary's regulatory scheme on this alternate basis.

Charter v. Bowen, ___F.2d___, No. 85-8378 (11th Cir. May 6, 1986). D. J. # 137-19M-254. Attorneys: John F. Cordes (FTS 633-3380) and Alfred R. Mollin (FTS 633-4116), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

QUIET TITLE ACT 12-YEAR LIMITATIONS PERIOD BARS HEIR TO INDIAN ALLOTTEE'S SUIT.

An action seeking a declaration that plaintiff alone possessed valid title to inherited Indian lands and that the title the United States asserted was defective, and an order requiring the United States to pay her the value of her interests in order properly to transfer title was barred by the Quiet Title Act's 12-year limitations period. The suit was a "civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." By 1967, at the very latest, the plaintiff was on notice that the government did not recognize her title to the allotments in question.

United States v. Mottaz, ___U.S.___, No. 85-546 (June 11, 1986). D. J. # 90-2-4-795. Attorneys: J. Carol Williams (FTS 633-2757) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

TAKING CLAIM BY LAND DEVELOPER DEEMED PREMATURE.

The Supreme Court held, that a California partnership had not proved the restrictions on its land use precluded all development amounting to taking their property for public use. For the fourth time in six years the Court declined to decide whether persons, who are prevented by local zoning laws from developing their land in a way they desire, may recover compensation for a taking. The partnership, which owns 44 acres of undeveloped land near Davis, California, argued it was entitled to compensation by the city and county governments which had rendered its property worthless by land regulations to block residential development and relegating the land to farming, for which it was unsuitable. Justice Steven's majority opinion said it would be premature to decide that issue, because state court rulings in the case "leave open the possibility that some development will be permitted."

MacDonald, Sommer & Frates v. Yolo County, ____U.S.____, No. 84-2015 (June 25, 1986). D. J. # 90-1-24-174. Attorneys: Raymond B. Ludwiszewski (FTS 633-2756) and Peter R. Steenland, Jr. (FTS 633-2748), Land and Natural Resources Division.

NEPA CHALLENGE REJECTED WHERE OPPONENTS OF FEDERAL MEDICAL CENTER FAILED TO RAISE SIGNIFICANT ENVIRONMENTAL ISSUE.

The Bureau of Prisons (BOP) purchased a former state mental institution in Rochester, Minnesota, for conversion to a Federal Medical Center. The process required the addition of high-powered lighting, fencing, a patrol road, and the building of a guard house at the entrance. BOP prepared an Environmental Impact Statement for the project, which was challenged in the district court. After denying a preliminary injunction, the district court held that BOP had done more than was required under NEPA in preparing its EIS because the action of retrofitting the state institution had no major environmental impact. The court of appeals affirmed.

Finding that the main impact from the project was aesthetic, the court held that Olmsted Citizens had failed to raise a significant environmental issue within the meaning of NEPA. For that reason, summary judgment for the BOP was properly granted by the district court. Judge Arnold dissented, believing that a trial should have been held on the issue of whether an EIS was necessary.

Olmsted Citizens for a Better Community v. United States Bureau of Prisons, No. 85-5141 (8th Cir. June 9, 1986). D. J. # 90-1-4-2712. Attorneys: Claire L. McGuire (FTS 633-2855) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

NOTICE AND HEARING ON LEGISLATIVE WITHDRAWAL PROPOSAL UNDER NEPA ALSO SATISFIED ADMINISTRATIVE WITHDRAWAL UNDER FLPMA.

In connection with the proposal to establish the Snake River Birds of Prey National Conservation Area, the Secretary of Agriculture prepared a draft and final EIS and held hearings. The original proposal was for a permanent legislative withdrawal. An alternative proposal was for an administrative withdrawal of 20 years for a lesser number of acres. Sagebrush Rebellion, which opposed the creation of the Conservation Area, argued that the Secretary had failed to satisfy the notice and hearing requirements of FLPMA when he acted under NEPA. The district court rejected Sagebrush's argument that the Secretary was required to hold a separate set of FLPMA hearings in addition to the previously conducted NEPA hearings.

On appeal, the Ninth Circuit affirmed. It held that while the notices "did not comply in every respect with the terms of Section 204(b)," the error was harmless since the purposes of FLPMA were fully satisfied. The notices under NEPA for a contemplated legislative withdrawal satisfied the administrative withdrawal under FLPMA. Likewise the hearings held pursuant to NEPA satisfied FLPMA's hearing requirement. The NEPA hearings provided the public with a full and fair opportunity to be heard on concerns relevant under FLPMA to the administrative withdrawal of the Conservation Area.

Sagebrush Rebellion, Inc. and National Audubon Society v. Clark, ___F.2d ___, No. 84-4371 (9th Cir. May 28, 1986). D. J. # 90-1-4-2177. Attorneys: Jacques B. Gelin (FTS 633-2762) and Robert L. Klarquist (FTS 633-5580), Land and Natural Resources Division.

SUIT CHALLENGING PERMIT TO TAKE KILLER WHALES NOT LIMITED BY SECTION 104(d)(6) OF MARINE MAMMAL PROTECTION ACT.

The Marine Mammal Protection Act ("MMPA") 16 U.S.C. §1361-1407, generally prohibits the taking of marine mammals except where authorized under a permit issued by the National Marine Fisheries Service ("NMFS"). Sea World applied to NMFS for a permit to permanently remove 10 killer whales from Alaskan and Californian waters for research and display and up to 90 killer whales to be held temporarily (up to three weeks) for research purposes. After public notice and hearing on the permit application, NMFS granted the permit to Sea World, subject to certain conditions. NMFS did not prepare an EA or EIS prior to issuing the permit.

More than 60 days after the permit had been issued, plaintiffs filed an action in the district court alleging that NMFS was required by NEPA to prepare an EIS prior to issuing the permit. The district court agreed and entered a judgment declaring the permit to be null and void and enjoining Sea World from capturing the whales, pending completion of an EIS. NMFS and Sea World appealed.

The Ninth Circuit affirmed in part and reversed in part. First, the court found that the action was not barred by Section 104(d)(6) of the MMPA, 16 U.S.C. §1374(d)(6), which requires suits for "judicial review of the terms and conditions of any permit" to be brought within 60 days of the date on which the permit is issued. Second, the court ruled that Section 104(d), which requires NMFS to process a permit application within 90 days of giving the public notice, is not in irreconcilable conflict with the EIS requirements of NEPA. Third, the Ninth Circuit found that the grant of the permit application was not categorically excluded from NEPA under NMFS' regulations as it was the subject of controversy based on potential environmental consequences and had certain environmental impacts or unique or unknown risks.

Jones v. Gordon, ____F.2d____, No. 85-3739 (9th Cir. June 19, 1986). Attorneys: Eileen Sobeck (FTS 724-7371), James C. Kilbourne (FTS 724-7371) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

SEVERANCE DAMAGE AWARD BASED WHOLLY ON APPRAISER'S TESTIMONY, WITHOUT ANY MARKET DATA, SUSTAINED.

The United States acquired a 100-foot-wide perpetual easement, plus some easements for access roads, totalling about 59 acres, over a 6,200-acre ranch in Eastern Washington. The district court denied the government's in limine motion and allowed the landowner to introduce evidence that ground disturbance activities within the easement area diminished the value of nearly 5,700 unencumbered acres of the remaining ranch by $25 per acre--about $141,500 (in addition to the compensation for the easement area).

On the government's appeal, the Ninth Circuit affirmed. It held that the district court did not abuse its discretion in admitting the evidence allowing the landowners' expert to testify to the adverse effect of the taking by the perceived effect of knapweed on the value of the ranch. Objective market data is not required, the court wrote, where no comparable sales exist and where a knowledgeable expert makes a reasoned evaluation of the risk of weed damage at the time of the condemnation. Finally, characterizing the government's argument as attacking the weight of the evidence, the court said that unless a motion for a directed verdict is made this claim is waived (unless there is "plain error"--which did not exist).

United States v. 33.5 Acres in Okanogan County, Wa. (Smith), ___F.2d___, No. 35-3631 (9th Cir. May 19, 1986). D. J. # 33-49-215-6500. Attorneys: Jacques B. Gelin (FTS 633-2762) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

NAVIGATIONAL SERVITUDE EXTENDS TO ARTIFICIALLY CREATED OUTER PERIMETER OF LAKE.

Pursuant to the Flood Control Act of 1950, the United States Army Corps of Engineers built the Albeni Falls Dam and Reservoir Project. The project raised the level of Lake Pend Oreille in Idaho from 2,051 to 2,062.5 feet above sea level. The Corps, which had acquired flowage easements from plaintiff and other riparian landowners sought to compel them to apply for after-the-fact permits under Section 10 of the River & Harbors Act of 1899, for structures plaintiff had caused to be built within the new high water mark. Plaintiff denied that the Corps had regulatory jurisdiction and, joined by a landowners association, filed suit for declaratory and injunctive relief, arguing that the Corps' rights were limited by the terms of its easement. The district court sustained the Corps' authority and directed plaintiff to apply for an after-the-fact permit.

On appeal, the Ninth Circuit affirmed, holding that the government's navigational servitude over navigable waters does not arise from title obtained by the Declaration of Taking. It derives from the Commerce Clause of the Constitution. The court also said the Corps was bound neither by past conduct nor officials' representations from asserting its regulatory jurisdiction.

Swanson v. United States, ___F.2d___, No. 85-3718 (9th Cir. May 16, 1986). D. J. # 90-5-1-6-253. Attorneys: Jacques B. Gelin (FTS 633-2762) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

CHICKEN PROCESSOR LACKS STANDING TO CHALLENGE EPA'S DISBURSAL OF FUNDS TO HELP FINANCE UPGRADING OF WASTEWATER TREATMENT PLANT.

The operator of a chicken processing plant and a local resident of Jasper, Alabama, who are charged user fees for discharges of wastewater into publicy-owned treatment works, appealed dismissal of complaint for lack of standing. Suit had been brought seeking declaratory and injunctive relief to prevent disbursal of federal funds by EPA or the Alabama Department of Environmental Management. The funds had been awarded to the Jasper Utilities Board to help finance construction of a plant upgrade after EPA had issued a NPDES permit, pursuant to the Clean Water Act, establishing stringent effluent limitations for the plant. The Eleventh Circuit affirmed, holding that plaintiffs had no standing because even if they were economically injured by a rate increase imposed as a result of plant expansion, the relief they sought would not necessarily remedy that injury by causing user rates to remain at their current level.

Marshall Durbin Co. v. EPA, ___ F.2d ___, No. 85-7331 (11th Cir. May 9, 1986). D. J. # 90-5-1-1-2291. Attorneys: Robert L. Klarquist (FTS 633-2731) and Arthur E. Gowran (FTS 633-2754), Land and Natural Resources Division.

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FLORIDA, SOUTHERN

DISTRICT COURT RULED THAT A FUGITIVE CANNOT LITIGATE A CLAIM IN A CIVIL FORFEITURE ACTION; AND, EXPANDED THE DEFINITION OF FUGITIVE TO INCLUDE A PERSON WHO LEARNS OF CHARGES WHILE LEGALLY OUTSIDE THE JURISDICTION "CONSTRUCTIVELY FLEES" BY NOT RETURNING TO FACE CHARGES.

Defendant currency was seized at Miami International Airport, and forfeited to the government under 31 U.S.C. §5317 because no report of the transportation of the currency was filed with the United States Customs Service, as required by 31 U.S.C. §5316 and the regulations promulgated by the Secretary of Treasury. The United States issued a warrant against the party for aiding and abetting the failure to file United States Customs Form 4790 in connection with the export of the defendant currency. The government later filed an in rem forfeiture action against the defendant currency. The party interposed a claim in the forfeiture action, but failed to appear for scheduled dispositions without benefit of court order.

The district court dismissed party's claim and ordered forfeiture. The court held that a fugitive can't litigate a claim in a civil forfeiture action. Moreover, it significantly expanded the definition of fugitive by holding that a person who learns of charges while legally outside the jurisdiction "constructively flees" by not returning to face the charges; that person is therefore a fugitive from justice and not entitled to litigate claims in federal court.

United States v. One Lot of United States Currency Totalling $506, 537.00, 628 F. Supp. 1473 (S.D. Fla. 1986). Attorney: Jonathan Goodman, Assistant United States Attorney, Florida, Southern, (FTS 350-6832).

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%
03-14-86	7.06%
04-11-86	6.31%
05-14-86	6.56%
06-06-86	7.03%
07-09-86	6.35%

NOTE: When computing interest at the daily rate, round (5/4) the product (*i.e.*, the amount of interest computed) to the nearest whole cent.

For cumulative list of those federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, see *United States Attorneys' Bulletin*, Vol. 34, No. 1, Page 25, January 17, 1986.

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TABLE OF CONTENTS

Page

COMMENDATIONS.......... 253

CLEARINGHOUSE

Gun Control Act Amendment Overview.......... 255

POINTS TO REMEMBER

Attorney General's Advisory Committee of United States Attorneys.......... 255
Affirmative Litigation.......... 256
Career Opportunities.......... 256
Felonious Sexual Molestation of a Minor--Major Crimes Act Amendment.......... 256
Guidelines for Administering the Assets Forfeiture Fund.......... 257
Peremptory Challenge of Swain v. Alabama Reaffirmed in Batson v. Kentucky. 257
Personnel.......... 259
Prompt Transmission of Court of Appeals Decisions.......... 259

CASENOTES

OFFICE OF THE SOLICITOR GENERAL.......... 259
CIVIL DIVISION.......... 261
CRIMINAL DIVISION.......... 268
LAND AND NATURAL RESOURCES DIVISION.......... 268
UNITED STATES ATTORNEYS' OFFICES.......... 270

APPENDIX 274

VOL. 34, NO. 11 THIRTY-THIRD YEAR OCTOBER 15, 1986

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COMMENDATIONS

The following Assistant United States Attorneys have been commended:

K. TATE CHAMBERS (Illinois, Central) by Postal Inspector-in-Charge L. W. Wiggs, United States Postal Service, for his successful prosecution of a complex mail fraud scheme.

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LINDA ANN HALPERN (District of Columbia) by Mr. Alfred H. Oberg, Director, Southwest Area, Agricultural Stabilization and Conservation Service, Department of Agriculture, for her effective handling of a complicated Title VII case.

NANCY L. HOLLEY (Texas, Southern) by Regional Inspector E. Derle Rudd, Internal Revenue Service, for her successful prosecution of a Title 18, United States Code, Section 1505 violation and her efforts and assistance in the successful prosecution of six other internal security investigations.

S. GAY HUGO and WARREN P. REESE (California, Southern) by District Director Michael J. Quinn, Internal Revenue Service, for their prosecution of a narcotics and tax violations case.

MATTHEW L. JACOBS (Wisconsin, Eastern) by Mr. Elliot E. Lieb, Chief, Criminal Investigation Division, Internal Revenue Service, for his successful prosecution of a federal income tax violations case.

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DANIEL G. KNAUSS (Arizona) by United States Senator Dennis DeConcini, for his actions in the federal investigation of Civilian Materiel Assistance members.

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ARTHUR W. LEACH (Georgia, Southern) by Special Agent-in-Charge Thomas W. Stokes, Bureau of Alcohol, Tobacco and Firearms, for his outstanding trial preparation and presentation in an arson case.

C. BRIAN MCDONALD (Massachusetts) by Inspector General William R. Barton, General Services Administration, for his successful efforts in a bribery case.

JEFFREY H. MOON (District of Columbia) by Colonel David B. Briggs, Judge Advocate General Core, Department of the Army, for his successful defense of a challenge to the validity of the Compact of Free Association and the Army's right to use the Kwajalein Missile Range.

JOHN P. PANNETON (Calfornia, Eastern) by Mr. Richard C. Smith, Chief, Operations Division, Department of the Air Force, for his presentation on "Air Force Office of Special Investigations/Assistant United States Attorneys' Interaction and Parallel Proceeding" at the annual Air Force OSI Fraud Seminar.

RICHARD W. ROBERTS (New York, Southern) by Mr. William M. Silverman, Regional Inspector General for Investigations, General Services Administration, for his efforts in a drug case involving a Federal Protective Officer.

A. DUANE SCHWARTZ (Kentucky, Western) by Captain John Spellman, Commander, Special Investigations Unit, Jefferson County Police Department, and Special Agent-in-Charge Joel A. Carlson, Federal Bureau of Investigations, for successfully prosecuting ten defendants in one of the largest clandestine drug lab seizures in the midwest.

RICHARD G. STEARNS (Massachusetts) by Assistant Inspector General for Investigations B. G. Truxell, Department of Defense, for his successful prosecution of a fraud case; and by Judge Angelo Gargani, Examining Magistrate and Judge Giorgio Sanatacroce, Public Prosecutor, Tribunale Penale Di Roma, for his assistance in a criminal investigation pursuant to the Mutual Assistance in Criminal Matters Treaty between the United States and Italy.

PETER J. STRIANSE (Florida, Middle) by Special Agent-in-Charge James Cagnassola, Jr., Federal Bureau of Investigation, for his successful assistance in the fraudulent acquisition of Veterans Administration guaranteed loans case.

RICHARD E. WELCH III, Special Assistant United States Attorney ANDREW LAUTERBACH (Massachusetts), and MARK P. FITZSIMMONS (Land and Natural Resources

Division) by Colonel Thomas A. Rhen, Corps of Engineers, Department of the Army, for their excellent work in a Clean Water Act case.

VICTOR A. WILD (Massachusetts) by Special Agent-in-Charge James E. Gavin, United States Secret Service, for his successful prosecution of a case involving threats against law enforcement officers, the seizure of United States currency and plates, and the seizure of negative and automatic weapons.

JACK L. WOLFE (Texas, Southern) by Inspector-in-Charge A. T. Brown, United States Postal Service, for his successful conclusion of a child pornography case.

CLEARINGHOUSE

Gun Control Act Amendment Overview.

On May 19, 1986, the President signed the Firearms Owners' Protection Act (the 1986 Act), which amends the Gun Control Act of 1968 (codified at 18 U.S.C. §§921 *et seq.*), and the National Firearms Act (codified at 26 U.S.C. §§5801 *et seq.*). The 1986 Act repeals the Omnibus Crime Control and Safe Streets Act (codified at 18 U.S.C. App. §§1201 *et seq.*), but incorporates that statute's key provisions. While four specific sections of the 1986 Act became effective immediately, the majority of the provisions, and the most important ones, do not become effective until November 15, 1986. On July 8, 1986, three sections of the 1986 Act were amended by Public Law No. 99-360.

The Criminal Division has prepared an overview of the amended sections, which gives a section-by-section synopsis of the provisions especially important to federal prosecutors. Two copies of the overview have been mailed to each United States Attorney's office. Additional copies are available from the Office of Legal Services on FTS 633-4024. Please request item no. CH-38.

(Executive Office)

POINTS TO REMEMBER

Attorney General's Advisory Committee of United States Attorneys.

During its July 22-23, 1986, meeting, the Attorney General's Advisory Committee of United States Attorneys elected the following new officers:

Chairman, Robert G. Ulrich (Western District of Missouri)
Vice-Chairman, Joe B. Brown (Middle District of Tennessee)
Vice-Chairman, John D. Tinder (Southern District of Indiana)

Other members of the Committee are:

Daniel A. Bent, District of Hawaii
James W. Diehm, District of Virgin Islands
Frank W. Donaldson, Northern District of Alabama

Helen M. Eversberg, Western District of Texas
Rudolph W. Giuliani, Southern District of New York
Frederick J. Hess, Southern District of Illinois
J. Alan Johnson, Western District of Pennsylvania
John E. Lamp, Eastern District of Washington
Kenneth W. McAllister, Middle District of North Carolina
John Volz, Eastern District of Louisiana
Brent D. Ward, District of Utah
Rodney S. Webb, District of North Dakota
Joseph E. diGenova, District of Columbia, *ex officio*

(Executive Office)

Affirmative Litigation.

A group of individuals, who had been enjoined by the State of Washington from what appeared to be a fraudulent mortgage loan scheme conducted in part through the mail, moved to Utah to conduct the same operation. The FBI notified the United States Attorney's Office for the District of Utah of the group's alleged activities and its move to Utah. The United States Attorney filed a complaint and obtained a preliminary injunction pursuant to 18 U.S.C. §1345, enjoining the individuals and their new Utah company from advertising or accepting nonrefundable application fees for new or refinanced mortgage loans until the defendants could establish that loans at such low rates were in fact available. This criminal statute (18 U.S.C. §1345), which apparently has not been interpreted by the courts, appears to be a very useful tool to enjoin fraudulent schemes before individuals are harmed and while a criminal investigation is proceeding. *United States v. RIO Financial Services*, 86-C-0435J (U.S.D.C. Utah).

(Executive Office)

Career Opportunities.

The Organized Crime and Racketeering Section is seeking two attorneys to staff the Cleveland Strike Force office. One attorney-position requires a senior-level prosecutor with three or more years of experience in handling progressively complex criminal cases, and the other position requires a junior attorney with at least three years of litigative experience. Interested, qualified attorneys should contact Paul E. Coffey, Deputy Chief, Organized Crime and Racketeering Section, on FTS 633-3594.

(Criminal Division)

Felonious Sexual Molestation of a Minor--Amendment to Major Crimes Act.

On May 15, 1986, Congress amended the Major Crimes Act, 18 U.S.C. §1153, by adding the offense of "felonious sexual molestation of a minor" to the list of Indian country offenses for which an Indian can be prosecuted in federal court. The amendment assimilates state substantive law and punishment.

Previously, sexual molestation of an Indian minor by an Indian was subject only to the lesser penalties of tribal law, which may not exceed six months imprisonment and/or a fine of $500. In addition to the insufficient punishment, the punishment given to Indians and that given to non-Indians committing the same serious offense or to Indians committing the offense against non-Indian children was unfair.

Congress amended Section 1153 in response to this insufficiency and unfairness as well as to reports by many United States Attorneys and others that there was an increase in reports of sexual molestation of children on Indian reservations. The legislative history of the amendment makes it clear that the new offense is generic in nature and is to include any state felony proscribing the conduct of nonforcible sexual abuse of the person of a minor. Included in this category would be state felony offenses denominated "sexual molestation," "indecent liberties," and "sexual contact with children."

(Criminal Division)

Guidelines for Administering the Assets Forfeiture Fund With Regard to "Extraordinary" Expenses (Opinion No. L 86-6).

On May 30, 1986, Deputy Attorney General D. Lowell Jensen signed the above-captioned guidelines which provide further administrative guidance on asset forfeiture matters. Copies of the guidelines were mailed to all United States Attorneys for distribution to asset forfeiture personnel within their offices.

(Executive Office)

Peremptory Challenge of Swain v. Alabama, 380 U.S. 202 (1965) Reexamined and Reaffirmed in Batson v. Kentucky, 471 U.S. (1985).

In Batson v. Kentucky, 471 U.S. ___ (1985), the criminal trial of a black man, the judge conducted vior dire examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury convicted petitioner.

On appeal, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that Swain v. Alabama, 380 U.S. 202 (1965) apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow decisions of other states, People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and Section 11 of the Kentucky Constitution to a jury drawn from a cross-section of the community. Petitioner also contended that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under Swain. Affirming the conviction, the Kentucky Supreme Court declined to consider the reasoning of other states courts. The court noted that in another case it had relied on Swain, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.

The Supreme Court granted certiorari and stated that "a defendant has no right to a petit jury composed in whole or in part of persons of his own race, Strauder v. West Virginia, 100 U.S. 303. However, the Equal Protection Clause guarantees the defendant that the state will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. The Court further stated that by denying a person participation in jury service on account of his race the state also unconstitutionally discriminates against the excluded juror. The Court noted that the same equal protection principles applied to determine whether there is discrimination in selecting the venire also govern the state's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason, as long as that reason is related to his/her view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the state's case against a black defendant.

The Court further held that the portion of Swain, supra, concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the state's discriminatory use of peremptory challenges is rejected. In Swain, it was held that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. This evidentiary formulation is inconsistent with the equal protection standards subsequently developed in decisions relating to selection of the jury venire. A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his/her good faith in individual selections.

In Batson, the Supreme Court remanded the case for further proceedings because the trial court flatly rejected defense counsel's objection without requiring the prosecutor to give an explanation for his action. The Court also ordered petitioner's conviction reversed if the trial court decided that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action.

(Executive Office)

Personnel.

On September 10, 1986, James G. Richmond took the Oath of Office as the Presidentially-Appointed United States Attorney for the Northern District of Indiana.

(Executive Office)

Prompt Transmission of Court of Appeals Decisions

United States Attorneys and Assistants should keep in mind the need to promptly transmit all court of appeals decisions to the Civil Division's Appellate Staff and to the affected client agencies. Prompt transmission is essential if the agencies and the Appellate Staff are to have adequate time to consider such questions as whether to seek rehearing or rehearing *en banc* from an unfavorable decision, or whether to seek publication of a favorable unreported opinion. Additionally, if the decision is unfavorable, the Appellate Staff should be contacted by telephone immediately upon receipt of the opinion, since most courts only allow 14 days to seek rehearing (absent an extension).

(Civil Division)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A petition for certiorari in *United States v. Hohri*, 782 F.2d 227 (D.C. Cir. 1986). The questions are (1) whether 28 U.S.C. §1295(a)(2) vests appellate jurisdiction in the regional circuit or in the federal circuit when a case raises claims under the Little Tucker Act and the Federal Tort Claims Act; and (2) whether the six-year statute of limitations bars claims filed in 1983 that allege that Japanese-Americans who were interned during World War 11 were deprived of property without just compensation.

A petition for certiorari in *King v. Schultz*, (D.C. Cir. 1986). The issue is whether, in calculating an attorneys' fee award against the government, a court should calculate its "lodestar" on the basis of the prevailing attorneys' current rates or on the historic rates in effect at the time the work was performed.

A petition for certiorari in *United States v. Fausto*, 783 F.2d 1020 (Fed. Cir. 1986). The issue is whether the Civil Service Reform Act bars a suit by a federal employee bringing a *Bivens* action against his employer.

A petition for certiorari in *United States v. Salerno*, No. 86-1197 (2d Cir. July 3, 1986). The question presented is whether Section 3142(e) of the Bail Reform Act of 1984, which authorizes the pretrial detention of a criminal suspect if no release conditions "will reasonably . . . assure the safety of any other person and the community," is unconstitutional on its face.

A petition for certiorari and a writ of mandamus in Abortion Rights Mobilization v. Baker, (2d Cir. 1986). The question presented is whether plaintiffs, certain organizations and individuals supporting the right of women to obtain abortions, have standing to sue the Secretary of the Treasury and the Commissioner of the Internal Revenue Service to compel revocation of the tax exemption granted to the Catholic Church.

A petition for certiorari in Hodel v. Tribal Village of Akutan, 792 F.2d 1376 (9th Cir. 1986). The issue is the proper construction of Section 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §3101.

A petition for certiorari in Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986). The question presented is whether a serviceman who suffers injuries incident to his service activities may sue the United States under the Federal Tort Claims Act or individual officers with a Bivens action.

A brief amicus curiae in Hewitt v. Helms, 780 F.2d 387 (3d Cir. 1986). The question presented is whether a party who succeeds in establishing a new substantive rule of law in a non-class action suit that serves as a catalyst for administrative action is a "prevailing party" under 42 U.S.C. §1988, although he himself did not benefit from his suit.

A brief amicus curiae in Dixon v. Westinghouse Electric Corp., 787 F.2d 943 (4th Cir. 1986). The question presented is whether the 300-day statute of limitations contained in 42 U.S.C. §2000e-5(e) applies when a state or local agency has entered into a work-sharing agreement with the Equal Employment Opportunity Commission and waives its right to process the charge filed by the complainant.

A brief amicus curiae in Societe Nationale Industrielle Aerospatiale v. United States, 782 F.2d 120 (8th Cir. 1986). The question is whether a federal district court, adjudicating a private civil suit involving a foreign company subject to the court's jurisdiction, should employ the procedures set forth in the Hague Evidence Convention for discovery of documents and information within the possession or control of the foreign company but located abroad.

A brief amicus curiae in California Coastal Commission v. Granite Rock Co., 768 F.2d 1077 (9th Cir. 1985). The question presented is whether a quarry operator, conducting mining operations on federal lands pursuant to a federal mining claim and in accordance with federal regulations, is subject to state regulation under California's costal zone management permitting program.

A brief amicus curiae in Johnson v. Transportation Agency, 770 F.2d 752 (9th Cir. 1985). The question presented is whether respondent violated Title VII of the Civil Rights Act of 1964 by promoting a female employee over petitioner, a more-qualified male employee, pursuant to an affirmative action plan.

A brief amicus curiae in School Board of Nassau County v. Arline, 772 F.2d 759 (11th Cir. 1985). The questions presented are (1) whether Section 504 of the Rehabilitation Act of 1973, which forbids discrimination in federally-assisted programs against an otherwise qualified handicapped individual "solely by reason of his handicap," makes unlawful discrimination based on concern about contagiousness, and (2) whether a person who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504.

A brief amicus curiae in Colorado v. Spring, (Colo. Sup. Ct. 1985). The question presented is whether respondent's voluntary statements should be suppressed under Miranda v. Arizona, 384 U.S. 436 (1966), on the ground that the law enforcement officers' failure to identify in advance crimes that would be the subject of the interrogation rendered respondent's waiver of his Miranda rights ineffective.

A brief amicus curiae in Hobbie v. Unemployment Appeals Commission, (Fla. Dist. Ct. of Appeals 1985). The issue is whether a state violates the Free Exercise Clause by denying unemployment benefits to someone who lost her job because, pursuant to a religious conversion, she would no longer work on a particular day of the week.

A brief amicus curiae in Cruz v. New York, 485 N.E.2d 221 (N.Y. Ct. of App. 1985). The questions presented are (1) whether the admission, with limiting instructions, of a non-testifying co-defendant's confession that implicated petitioner violated petitioner's Confrontation Clause rights, where the confession (a detailed videotaped statement) contained strong indicia of reliability; and (2) whether admission of the confession was proper on the ground that it "interlocked" with petitioner's own confession.

CIVIL DIVISION

SUPREME COURT AFFIRMS HOLDING BY THREE-JUDGE COURT STRIKING DOWN GRAMM-RUDMAN ACT.

The Gramm-Rudman Act provides that, after the budget is passed each year, the Comptroller General must determine whether that budget meets specified budget deficit reduction targets based on his predictions regarding the economic situation in the United States. Plaintiffs challenged the statute, arguing that it unconstitutionally delegated legislative power to an officer other than Congress itself. The Executive Branch disagreed with this argument, but declined to defend the statute because it took the position that the statute was invalid insofar as it delegated an executive task to the Comptroller General, who is removable by Congress. The Executive Branch also argued that the Comptroller General is an agent of Congress and cannot carry out functions other than through legislation. A three-judge district court found no delegation problem, but accepted the argument that the action at issue was executive in nature and could not be carried out by an officer removable by Congress. On direct appeal, the Supreme Court affirmed. Justices Stevens and Marshall concurred, but on a different ground. They accepted the argument that the Comptroller General, as an agent of Congress, can only act through the legislative process. Thus, Congress cannot delegate to one of its agents or component parts the ability to act in a way that has an effect on private rights except through legislation. Justices White and Blackmun dissented.

Bowsher v. Synar, ___U.S.___, No. 85-1377 (July 7, 1986). D. J. # 145-11-352. Attorneys: Robert Kopp (FTS 633-3311), Douglas Letter (FTS 633-3602) and Harold Krent (FTS 633-3159), Civil Division.

D.C. CIRCUIT HOLDS PROVIDERS ENTITLED TO IMMEDIATE ADMINISTRATIVE REVIEW OF SETTING OF HOSPITAL-SPECIFIC PORTION UNDER MEDICARE PROSPECTIVE PAYMENT SYSTEM.

Several hospitals challenged the hospital-specific portions set for their Medicare payments during the period of transition into the Prospective Payment System (PPS). The hospitals sought immediate review of the determinations of their hospital-specific portions before the HHS Provider Reimbursement Review Board (PRRB). Applying the provisions of Health Care Financing Administration Ruling (HCFAR) 84-1, the PRRB informed the hospitals that it could not exercise jurisdiction over their challenges until a Notice of Program Reimbursement (NPR) issued for the year in which the payments based on the challenged rate would have been made. In five consolidated actions, the hospitals attacked the jurisdictional determinations made by the PRRB, and prevailed on the key ground that HCFAR 84-1 is contrary to legislative intent. The D.C. Circuit affirmed, holding that the plain language of the statute establishes that Congress did not intend that the NPR be issued before the review sought would lie, and that its "'plain meaning' reading of the statutory language is confirmed by the legislative history."

Washington Hospital Center v. Bowen, ___F.2d___, Nos. 85-5906-5910 (D.C. Cir. July 8, 1986). D. J. # 137-16-1079. Attorneys: Anthony J. Steinmeyer (FTS 633-3388) and Edward R. Cohen (FTS 633-4331), Civil Division.

D.C. CIRCUIT HOLDS THAT GOVERNMENT WAS SUBSTANTIALLY JUSTIFIED IN APPEALING ATTORNEY'S FEE AWARD AS UNTIMELY EVEN THOUGH IT WAS NOT SUBSTANTIALLY JUSTIFIED IN UNDERLYING LITIGATION.

The American Academy of Pediatrics (AAP) appealed the denial of an award for fees incurred in connection with the government's appeal of an earlier fee award. The government challenged the underlying fee award, arguing that it was substantially justified in contesting the AAP's suit concerning a new regulation relating to the medical care and treatment of handicapped infants (the "Baby Doe" regulation) and that AAP's application was filed out of time. The Equal Access to Justice Act (EAJA) requires that application for fees be filed within 30 days of the final judgment in the action. 28 U.S.C. §2412(d)(1)(B)(1982). AAP filed its application within 30 days of the order dismissing the government's appeal but more than 30 days after entry of the district court judgment.

The D.C. Circuit affirmed the district court's denial of fees, holding that a technical defense exception, including the defense of untimely filing, should limit any fee-shifting rule that would automatically grant fees for all fee litigation. The court held the government was substantially justified in raising the timeliness issue.

American Academy of Pediatrics v. Bowen, ___F.2d___, No. 85-5784 (D.C. Cir. July 18, 1986). D. J. # 137-16-1028. Attorneys: William Kanter (FTS 633-1597) and Christine R. Whittaker (FTS 633-4096), Civil Division.

FIRST CIRCUIT HOLDS THAT SUPREME COURT DECISION IN HECKLER v. DAY PRECLUDES MAINTENANCE OF CLASS ACTIONS ALLEGING UNREASONABLE DELAY IN PROCESSING OF DISABILITY AND SSI CLAIMS.

This action is one of many challenging allegedly unreasonable delays in the processing of Social Security claims, and is essentially identical to Barnett v. Bowen (2d Cir.). The First Circuit, unlike the Second Circuit in Barnett, affirmed dismissal of plaintiffs' class action, holding that after Heckler v. Day, 467 U.S. 104 (1984), claims of unreasonable delay in the Social Security administrative process must be litigated on a case-by-case basis. The First Circuit expressly rejected the reasoning of the Barnett panel, which had given the Supreme Court decision a very narrow reading.

Crosby v. Social Security Administration, ___F.2d___, No. 85-1863 (1st Cir. July 22, 1986). D. J. # 181-36-121. Attorneys: John F. Cordes (FTS 633-3380) and John S. Koppel (FTS 633-5459), Civil Division.

THIRD CIRCUIT HOLDS THAT PHILADELPHIA CIVIL RIGHTS ORDINANCE, WHICH PROHIBITS DISCRIMINATION AGAINST HOMOSEXUALS, CANNOT BE APPLIED TO COLLEGES PERMITTING MILITARY RECRUITERS ON CAMPUS.

On the basis of a city ordinance prohibiting discrimination against homosexuals, the Philadelphia Commission on Human Relations ordered the Temple University Law School to "cease and desist" allowing military recruiters access to its placement office. The Commission pointed to the military departments' policy against accepting homosexuals as members of the uniformed services. The United States then filed suit in federal district court alleging that application of the Philadelphia ordinance in this case violated the Supremacy Clause. The district court agreed, and entered an injunction against further enforcement of the ordinance against military recruiting efforts. The Third Circuit affirmed the district court injunction. The panel agreed with the government's argument that Congress and the military viewed access to college and university students as essential to military recruiting, and that the Supremacy Clause does not permit a local ordinance to defeat such an important federal objective. The court of appeals also affirmed the district court's refusal to permit a homosexual rights organization to intervene in the lawsuit. This decision should prove a formidable barrier to the enforcement of state or local laws in a way that frustrates military interests.

United States v. City of Philadelphia, ___F.2d___, Nos. 85-1571, 85-1604 (3d Cir. Aug. 1, 1986). D. J. # 35-62-272. Attorneys: John F. Cordes (FTS 633-3380) and Robert V. Zener (FTS 633-3542), Civil Division.

FOURTH CIRCUIT AFFIRMS DISTRICT COURT RULING THAT COMMENCEMENT OF BANKRUPTCY PROCEEDING DOES NOT STAY COLLECTION OF CRIMINAL FINE.

In August 1982, the United States Court of Appeals for the Fourth Circuit fined the Troxler Hosiery Co., Inc., $80,000 plus costs based on Troxler's conviction for criminal contempt, as a result of the firm's violations of a 1978 Fourth Circuit order. Several months later Troxler filed a Chapter XI voluntary reorganization petition.

The United States filed an adversary proceeding in the bankruptcy court seeking a declaratory judgment that the automatic stay provision of the Bankruptcy Code, 11 U.S.C. §362(a), did not apply to the government's efforts to collect the criminal contempt fine and court costs. The bankruptcy court denied the government's request, but the district court reversed, 41 B.R. 457 (M.D.N.C. 1984), holding that the exception to the automatic stay for criminal actions, 11 U.S.C. §362(b)(1), permitted the government's fine collection efforts. The Fourth Circuit affirmed the district court opinion.

> United States v. Troxler Hosiery Co., Inc., ___F.2d___, No. 84-1846 (4th Cir. Aug. 4, 1986). D. J. # 104-54M-4. Attorney: John R. Fleder (FTS 724-6786), Office of Consumer Litigation, Civil Division.

SIXTH CIRCUIT AFFIRMS VALIDITY OF HHS SEVERITY REGULATIONS.

In determining entitlement to disability benefits, the Department of Health and Human Services employs a five-step sequential evaluation process. At step 2 an individual is found not disabled if he does not demonstrate a medically severe impairment and the inquiry does not proceed to consideration of whether he can perform his past work or other work.

The Sixth Circuit ruled that the agency's current interpretation of its regulation, embodied in a Social Security Ruling, is consistent with the governing statute and with its own earlier statements regarding the regulation. Under the Ruling only individuals with slight impairments are excluded at step 2. The issue of the validity of the regulation is currently before the Supreme Court in Bowen v. Yuckert.

> Salyers v. Secretary of HHS, ___F.2d___, No. 85-5237 (6th Cir. Aug. 20, 1986). D. J. # 137-30-1837. Attorneys: Robert S. Greenspan (FTS 633-5428) and Mark Stern (FTS 633-5534), Civil Division.

SIXTH CIRCUIT AFFIRMS CONVICTION AND GOVERNMENT USE OF CIRCUMSTANTIAL EVIDENCE TO PROVE ALTERATION OF AUTOMOBILE ODOMETERS

Defendant was convicted of mail fraud in violation of 18 U.S.C. §1341 and of altering odometers in violation of 15 U.S.C. §1984. On appeal, the Sixth Circuit held that it was not necessary that the government prove the actual alteration of odometers by direct evidence. The government had produced sufficient circumstantial evidence from which the jury could infer that defendant altered or directed someone else to alter the odometer of each car charged in the indictment.

The Sixth Circuit followed the majority of courts and held that elicitation during direct examination of a plea agreement containing a promise to testify truthfully does not constitute impermissibly bolstering of the witness's credibility. The Sixth Circuit further held that introduction of the entire plea agreement permits the jury to consider fully the possible conflicting motivations underlying the witness' testimony, and, thus, enables the jury to more accurately assess the witness's credibility.

United States v. Townsend, ____F.2d ___, No. 85-5813 (6th Cir. July 11, 1986). D. J. # 183-70-18. Attorneys: Raymond Philipps (FTS 724-6159), and Randy Chartash (FTS 724-6167), Office of Consumer Litigation, Civil Division.

EIGHTH CIRCUIT HOLDS THAT MAGISTRATES ACT DOES NOT AUTHORIZE DISTRICT COURTS TO REFER PRISON PETITION CASES TO MAGISTRATES FOR JURY TRIALS WITHOUT CONSENT OF THE PARTIES.

In this prisoner petition challenging conditions of confinement, the district court referred the case to the magistrate, notwithstanding petitioner's demand for a jury trial and refusal to consent to the magistrate's jurisdiction. The petitioner sought a writ of mandamus to compel the district court to withdraw the reference.

The Eighth Circuit accepted the government's contention that neither 28 U.S.C. §636(b)(1)(B) (authorizing magistrates to conduct evidentiary hearings) nor 28 U.S.C. §636(b)(3) (providing for the assignment of additional duties to magistrates) permitted a magistrate to conduct a jury trial without the consent of the parties. The court found that both the express statutory language of the Act and a comparison with other sections of the statute were evidence that nonconsensual references of prisoner civil rights cases to magistrates for jury trials were not permitted.

In re Wickline, ___F.2d___, No. 85-2338 (8th Cir. July 22, 1986). D. J. # 145-0-1819. Attorneys: William Kanter (FTS 633-1597), Linda Silberman (FTS 633-1673), and Harold J. Krent (FTS 633-3159), Civil Division.

EIGHTH CIRCUIT HOLDS THAT BATF AGENTS WHO DESTROYED CONTRABAND STILL ARE ENTITLED TO "QUALIFIED IMMUNITY" AND REMANDS FOR ENTRY OF SUMMARY JUDGMENT.

Plaintiff was convicted of moonshining in Missouri state court, and his still was confiscated. The state, however, sold the components of the still at auction. Plaintiff bought the principal components, which were contraband under 26 U.S.C. §5615, and displayed them in his auto body shop. Pursuant to 26 U.S.C. §5609(a), two investigating BATF agents seized the contraband equipment and destroyed it without a hearing, as authorized by statute if they determined that transportation and storage of the contraband would be "impracticable."

Plaintiff, thereafter, brought a Bivens action against the BATF agents, alleging that the destruction of the still violated his Fourth and Fifth Amendment rights. The district court denied the government's motion for summary judgment on "qualified immunity" grounds (since the agents had violated no clearly established constitutional rights in destroying plaintiff's contraband still), and set the case for trial.

On appeal, the Eighth Circuit reversed, stating that "the record admits of no other finding than that it was impracticable for [the agents] to remove the still to a safe storage area." The court, therefore, remanded the case for entry of summary judgment.

Hofsommer v. Neiman and Scott, ___F.2d___, No. 85-2362 (8th Cir. Aug. 8, 1986). D. J. # 157-43-711. Attorneys: Barbara L. Herwig (FTS 633-5452) and John S. Koppel (FTS 633-5459), Civil Division.

PANEL OF THE EIGHTH CIRCUIT GRANTS REHEARING AND VACATES OPINION HOLDING THE GOVERNMENT ABSOLUTELY LIABLE UNDER THE SWINE FLU ACT.

An Eighth Circuit panel, purportedly applying Iowa State law, held that the government could be liable under a theory of strict liability in tort for the unforseeable side effects caused by the swine flu vaccine. The panel also held that the government had the burden of proving that plaintiff would have foregone the vaccine, had she been adequately warned of its side effects. This "burden shifting presumption" thus shifts the burden on proximate causation to the government as defendant. The government filed a petition for rehearing with a suggestion for rehearing en banc, calling to the court's attention an Iowa Supreme Court decision which rejected the theory that a drug manufacturer could be held liable in strict liability for failure to warn of unforseeable side effects from a drug. Moore v. Vanderloo, No. 85-518 (April 16, 1986). The government also attacked the burden shifting presumption as being contrary to Iowa State law and the Swine Flu Act, and argued that the presumption had been implicitly rejected by the Iowa Supreme Court in Moore.

Granting, in part, the petition for rehearing, the panel vacated its opinion and remanded to the district court for reconsideration in light of Moore. The panel, however, also directed the district court to take evidence on the other grounds of relief asserted by plaintiff--negligence and breach of warranty. It appears, therefore, that plaintiff, on remand, will be entitled to no relief under a theory of strict liability unless she demonstrates the alleged side effects were foreseeable. However, since Moore did not explicitly reject the burden shifting presumption, the district court is apparently free to apply the presumption once again if it finds negligence on the part of the government.

Brazzell v. United States, ___F.2d___, No. 85-1698 (8th Cir. July 31, 1986). D. J. # 192-27-17. Attorneys: John F. Cordes (FTS 633-3380) and Carlene V. McIntyre (FTS 633-5459), Civil Division.

NINTH CIRCUIT AFFIRMS IN PART AND REVERSES IN PART DISTRICT COURT DECISION THAT QUALIFIED IMMUNITY PROTECTS SECRETARY OF HHS AND OTHER OFFICIALS FROM BIVENS ACTION BY SOCIAL SECURITY DISABILITY CLAIMANTS.

This case concerns the personal liability of certain state and federal officials and their immunity from damages arising from their alleged violations of the constitutional rights of Social Security disability claimants who were terminated during disability reviews in 1981. Claimants' confusing complaint alleged emotional and financial distress as the result of the following alleged violations by then-Secretary Schweiker and two other officials: improper acceleration of the continuing disability review process enacted by Congress in 1981; "nonacquiescence" in Ninth Circuit law; the failure of the state agency to apply any uniform written standards; the failure to render decisions consistent with allegedly dispositive evidence; and the use of an illegal "quota system" in which a minimum number of recipients were allegedly required to be terminated in a particular time period. The district court ruled that the officials were protected by qualified immunity from all of these claims.

On appeal, the Ninth Circuit disagreed with the government's assertion that 42 U.S.C. §405(g) provided the sole avenue of relief, and that plaintiffs' constitutional claims for deprivation of due process did not arise under the Social Security Act. The court then ruled that the officials, outside of Arizona, waived their personal jurisdiction defense by not raising it at the appropriate stage in the district court proceedings. Finally, the court affirmed the district court's qualified immunity ruling on the acceleration of review and nonacquiescence issues. However, it reversed and remanded on the other issues, stating that "[i]t cannot be determined [on this record] as a matter of law that the appellants could prove no state of facts under these allegations that resulted in violations of their due process rights and consequent damages."

Chilicky v. Schweiker, ___F.2d___, No. 84-2828 (9th Cir. Aug. 12, 1986). D. J. # 145-16-2207. Attorneys: Barbara Herwig (FTS 633-5425) and Howard Scher (FTS 633-4820), Civil Division.

TENTH CIRCUIT HOLDS THAT FOR GENERAL VENUE PURPOSES A CORPORATION "RESIDES" IN ITS STATE OF INCORPORATION, NOT IN THE STATE WHERE ITS PRINCIPAL PLACE OF BUSINESS IS LOCATED.

On the government's interlocutory appeal from the district court's refusal to transfer this asbestos case, the Tenth Circuit has joined seven other circuits in holding that for general venue purposes, under 28 U.S.C. §1391(e) and 1402(b), a corporation "resides" in its state of incorporation, not in the state where its principal place of business is located. The court also held that 28 U.S.C. §1391(c) did not affect this determination, because it applies only to corporate defendants, not corporate plaintiffs.

Johns-Manville Sales Corporation v. United States, ___F.2d___, No. 85-1596 (10th Cir. July 21, 1986). D. J. # 157-13-674. Attorneys: Robert S. Greenspan (FTS 633-5428) and Marc Richman (FTS 633-5735), Civil Division.

ELEVENTH CIRCUIT REVERSES DISTRICT COURT ORDER DISMISSING TITLE VII CLASS ACTION FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

Plaintiffs filed a Title VII class action complaint at the administrative level under procedures set out at 29 C.F.R. §1613.601 et seq. These regulations establish a set of administrative remedies modeled on Rule 23 of the Federal Rules of Civil Procedure. The Army "rejected" the class action complaint--a step akin to denial of class certification under Rule 23 of the Federal Rules of Civil Procedure--and notified plaintiffs that they were free to proceed with individual complaints of discrimination, to appeal the final agency decision to the EEOC, or to file a civil action in district court. Plaintiffs then filed suit in district court. The district court, reasoning that the agency had not reached the merits of any class or individual allegations of discrimination, dismissed the case for failure to exhaust administrative remedies.

The Eleventh Circuit reversed and remanded for a determination of whether the plaintiffs had made a reasonable, good faith effort to comply with the administrative class action requirements and to provide all the relevant and specific information available to them. The court held that, notwithstanding the availability of de novo judicial review, the mere presentation of a claim to the agency and receipt of a final decision will not satisfy the exhaustion requirement. The court further held, however, that the district court erred in failing to determine whether the plaintiffs had in fact exhausted administrative remedies by making a reasonable, good faith effort to comply with regulatory requirements.

Wade v. Secretary of Army, ___F.2d___, No. 85-8751 (11th Cir. Aug. 14, 1986). D. J. # 35-20-30. Attorneys: Robert S. Greenspan (FTS 633-5428) and Jeffrey A. Clair (FTS 633-4027), Civil Division.

CRIMINAL DIVISION

ATTORNEY'S FEES ASSESSED AGAINST DEFENDANT FOR BAD FAITH CLAIM.

Defendant, convicted of tax fraud, moved to vacate his three-year sentence of imprisonment on the grounds that the government improperly withheld records necessary to establish a minimal tax deficiency. The government responded by pointing out that: 1) the defendant had been given access to the documents; 2) the documents were equally accessible to the defense by other means; and 3) the documents were in no way exculpatory.

After a hearing, the court found that the motion "appear[ed] to be based on nothing more than an attempt to duplicate expenses" and that counsel for the defendant knew or should have known that the motion was wholly without merit and lacking in good faith. The court granted the government's motion for attorney's fees for the time expended in preparation for and to conduct the hearing. The fees were to be paid by counsel and his law firm.

United States v. Milito, ___F.Supp.___, No. 84-CR-189 (E.D.N.Y. June 30, 1986). Attorney: Douglas E. Grover, Special Attorney, Criminal Division. (FTS 656-7081).

LAND AND NATURAL RESOURCES DIVISION

WINNING ATTORNEYS ONLY RARELY ENTITLED TO FEE MULTIPLIERS.

The Supreme Court held that winning lawyers in a Clean Air Act case only rarely should be paid bonuses or "multipliers" for exceptional performances. Consequently, the lower courts had awarded too much money in ordering Pennsylvania to pay $216,488.03 to an environmental group that had successfully sued the state over automotive emissions. It was wrong to multiply the $27,372.50 fee (which was reasonable) by four. The Court ordered reargument on whether the "risk of loss" taken by lawyers who take such cases on a contingency basis is a reason to enhance their "reasonable" hourly rates when awarding fees.

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ___U.S.___, No. 85-5 (July 2, 1986). D. J. # 90-5-2-4-29. Attorneys: Karen L. Florini (FTS 633-2714) and Raymond B. Ludwiszewski (FTS 633-2756), Land and Natural Resources Division.

GOVERNMENT SUBSTANTIALLY JUSTIFIED IN CONDEMNATION CASE WHERE IT SELECTS EXPERIENCED, QUALIFIED, COMPETENT APPRAISER, RELIES ON HIS VALUATIONS AND DOES NOT ENGAGE IN BAD FAITH.

The United States acquired flowage easements over about half of a 3,000-acre tract owned by the Phisters. Originally, the government, based on two separate appraisals, offered the Phisters $140,000 and $211,000, respectfully. Both offers were rejected. At trial, another government appraiser testified that just compensation should be $115,000. The landowners' expert witness estimated value at $485,000. The commission made an award of $325,000. The district court confirmed. The landowners, as the prevailing party, applied for attorneys' fees under EAJA and claimed the government's position was not "substantially justified." The district court granted the landowner's petition.

On appeal, the Eighth Circuit reversed. In order to show substantial justification, the court held the government "must now show not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct." The court observed: "Appraising real estate is more an art than a science; it is incapable of mathematical precision and implicates methods of judgment." Finally, the court wrote: "When in a condemnation action the government selects experienced, qualified, competent appraisers, and consistently relies on their valuations in its offer of just compensation, without any evidence of bad faith on its part, its course of conduct is solid, well founded, and clearly reasonable. Its position, therefore, is substantially justified."

United States v. 1,378.65 Acres in Vernon County, Mo., Phister, ___F.2d___, No. 85-2021WM (8th Cir. July 1, 1986). D. J. # 33-26-472-3189. Attorneys: Jacques B. Gelin (FTS 633-2762) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

FOREST SERVICE ENJOINED FROM COMPLETING RECONSTRUCTION OF ROAD IN NATIONAL FOREST BASED ON INDIANS' FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF THEIR RELIGION.

In two consolidated actions, a group of Indians, two individual Sierra Club members and the state Native American Heritage Commission filed suit to enjoin the Forest Service from reconstructing the final six-mile, middle segment of the 55-mile road that traverses Six Rivers National Forest in California, the G-O Road (so-called because it connects to the towns of Gasquet and Orleans) and to enjoin all commercial timber harvesting and associated road building within a vast region called the "high country" which local Indians regard as sacred. In June 1985, a Ninth Circuit panel held that the district court did not err in enjoining the road construction and timbering in the 25-square-mile high country area of the national forest on the ground that (1) such activity would impermissibly burden the Indians' First Amendment rights to free exercise of their religion; (2) the Forest Service's environment impact statement (EIS) failed to adequately discuss the effects of the proposed actions on water quality, and (3) that the proposed actions would violate the Clean Water Act and state water quality standards.

On the government's petition for rehearing with suggestion for rehearing en banc, the panel granted the petition, withdrew its previous opinion, and filed a new panel opinion with a partial dissent by Judge Beezer (on the First Amendment issue). The enactment, on September 28, 1984, of the California Wilderness Act of 1984, which placed most of the area out of reach of logging (but left open a 1,200 foot-wide corridor for completion of the G-O Road) mooted the timbering issue; the issue of the completion of the G-O Road retained full vitality. The panel held that completion of the road would impermissibly burden the Indian's First Amendment rights because it would "virtually destroy" the Indians' ability to practice their religion. The permanent injunction enjoins the Forest Service "only" from completing the G-O Road and from commercial logging in the high country; the Forest Service remains free to administer the high country for "all other designated purposes including outdoor recreation, range, watershed, wildlife and fish habitat and wilderness. The court unanimously reaffirmed its prior holding regarding the Forest Service's EISs.

Northwest Indian Cemetery Protective Association v. Peterson, ___F.2d___, No. 83-2225 (9th Cir. July 22, 1986). D. J. # 90-2-4-848. Attorneys: Jacques B. Gelin (FTS 633-2762) and Robert L. Klarquist (FTS 633-2731), Land and Natural Resources Division.

UNITED STATES ATTORNEYS' OFFICES

ILLINOIS, SOUTHERN

SEVENTH CIRCUIT HOLDS THAT 1) PRISONERS' CLAIMS ARE BARRED UNLESS THEY SHOW "CAUSE AND PREJUDICE" FOR PROCEDURAL DEFAULTS AND 2) STRICTER REQUIREMENTS IN PRISON DISCIPLINARY CASES ARE NOT RETROACTIVE.

The petitioner, an inmate incarcerated at the United States Penitentiary in Marion, Illinois, was found guilty by the Institution Disciplinary Committee (IDC) of aiding in the killing of another inmate. The IDC relied on the statements of confidential informants whose names were never released to the petitioner. The petitioner made some attempts to pursue the three levels of administrative review set forth in 28 C.F.R. §542.10 et seq., but failed to exhaust his administrative remedies before bringing this habeas corpus suit. 28 U.S.C. §2241. The district court did not rule on the failure to exhaust issue and decided the case on the merits, holding that the petitioner's constitutional rights were not violated by the IDC hearing.

The Seventh Circuit found that the petitioner had failed to exhaust his administrative remedies and that the administrative remedy process was not unavailable to him. The court held that the petitioner's claim would be barred unless he could show "cause" for the procedural default and "prejudice" therefrom. The court found that the petitioner could not demonstrate prejudice because his IDC hearing was in 1980, over two years before the court decided

McCollum v. Miller, 695 F.2d 1044 (7th Cir. 1982), a case which imposed stricter requirements for disciplinary proceedings where the evidence in support of a finding of guilt is provided by confidential informants. The court held that the McCollum rules cannot be applied retroactively. Otherwise, tens of thousands of findings of guilt would be subject to invalidation and the disciplinary process would be highly disrupted.

Sanchez v. Miller, Warden, U.S. Penitentiary-Marion, Illinois, ___F.2d___, No. 84-2872 (7th Cir. June 9, 1986. Attorney: Laura J. Jones, Assistant United States Attorney, Illinois, Southern (FTS 958-6686).

INDIANA, SOUTHERN

SEVENTH CIRCUIT AFFIRMS SECRETARY'S DETERMINATION THAT ILLEGITIMATE CHILD, BORN AFTER ALLEGED FATHER'S DEATH, WAS NOT THE CHILD OF WAGE EARNER PURSUANT TO SECTIONS 216 (H)(2)(B) and 216(H)(3)(C) OF THE SOCIAL SECURITY ACT.

The Seventh Circuit affirmed the district court's judgment upholding the decision of the Secretary of the Department of Health and Human Services, which denied an illegitimate child born after his alleged father's death surviving child's benefits under the Social Security Act.

Under Section 216(h)(2)(A) of the Act, the Secretary must apply state law of intestate succession to determine whether the applicant was the child of the alleged father. Missouri state law required the applicant to establish "clear and convincing proof" of paternity, since paternity had not been adjudicated. An Administrative Law Judge (ALJ) found the evidence presented by the child's mother inconsistent, and denied surviving child benefits on the social security record of the alleged father. The ALJ stated that the applicant is not the child of wage earner under Missouri state law as required by Section 216(h)(2)(A) of the Act, nor pursuant to 216(h)(2)(B) of the Act as child's mother and wage earner never married, nor by Section 216(h)(3)(C) as the evidence of record did not establish that the wage earner was ever decreed by a court to be the child's father, was ever ordered by a court to contribute support, or ever acknowledged the child in writing.

The district court found "substantial evidence to support the Secretary's findings as the "totality of evidence" confirmed the administrative determination that applicant was not the child of wage earner within the meaning of the Social Security Act.

Imani v. Heckler, ___F.2d___, No. 85-1334 (July 31, 1986). # IP 83-1820-C. Attorney: Carolyn N. Small, Assistant United States Attorney, Indiana, Southern (FTS 331-6333).

NORTH CAROLINA, EASTERN

DISTRICT COURT UPHOLDS THE VALIDITY OF ADMINISTRATIVE DECISIONS PERMANENTLY DISQUALIFYING RETAILERS FROM PARTICIPATION IN THE FOOD STAMP PROGRAM.

Plaintiff, owner of a retail grocery and gasoline business, was authorized to participate in the food stamp program. During the approximately one and one-half years following plaintiffs authorization, the Food and Nutrition Service (FNS) received three separate complaints that plaintiff's employees were discounting and purchasing food stamp coupons and/or accepting food stamps in exchange for non-eligible items such as alcoholic beverages and cigarettes. Plaintiff was charged with five separate violations of the food stamp program regulations and, was permanently disqualified from participation in the food stamp program. Plaintiff submitted a timely request for review, and the agency sustained its initial decision.

Plaintiff then filed this lawsuit, arguing that a stay of the permanent disqualification, pursuant to 7 U.S.C. §2023(a), as amended, must be granted even if its likelihood of success on the merits were slim, since enforcement of the administrative decision prior to an opportunity for judicial review would deprive him of a property right without procedural due process protections. The district court engaged in an extensive due process analysis using the factors stated in Matthews v. Eldridge, 424 U.S. 319 (1976) and denied the stay. It upheld the constitutional validity of the administrative procedures for review of the disqualification.

Turnage v. United States, ___F.2d___, 86-381-CIV-5 (E.D.N.C. May 12, 1986). Attorney: Stephen A. West, Assistant United States Attorney, North Carolina, Eastern (FTS 672-4530).

TEXAS, SOUTHERN

DISTRICT COURT RULED THAT "PREVAILING PARTY" ISSUE FOR PURPOSES OF EQUAL ACCESS TO JUSTICE ACT IN AN EMINENT DOMAIN CASE SHOULD BE ANALYZED BASED UPON THE VALUE OF THE ENTIRE CONDEMNED MINERAL ESTATE, NOT IN TERMS OF THE VARIOUS INDIVIDUAL OWNERSHIP INTERESTS.

Three groups of defendants applied pursuant to EAJA for attorney's fees and expenses totaling $1,013,978.78 after a trial before a commission to determine the fair market value of a mineral estate. The district court held that the 1986 clarifying amendments to EAJA applied, including the definition of "prevailing party" in condemnation cases. 28 U.S.C. §2412(d)(2)(H). The prevailing party is the one whose testimony in court is closer to the award.

In a case of first impression, the district court rejected defendants' assertion that the prevailing party issue should be analyzed based on each individual ownership interest in the condemned mineral estate. Instead of comparing each defendant's highest valuation testimony to the government's highest valuation testimony, the court correctly totalled defendants' proposed values. The court compared the defendants' values with those stated by the government's expert witnesses. It found the United States' estimate was substantially closer to the amount awarded by the commissioners. The United States was granted summary judgment as the prevailing party, barring defendants from recovering any fees or costs under EAJA.

United States v. 5,507.38 Acres of Land, in Live Oak and McMullen Counties, State of Texas, C.A. No. L-81-73 (S.D. Tex. 1986). Attorney: Frances H. Stacy, Assistant United States Attorney, Texas, Southern (FTS 526-4693).

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%
03-14-86	7.06%
04-11-86	6.31%
05-14-86	6.56%
06-06-86	7.03%
07-09-86	6.35%
08-01-86	6.18%

NOTE: When computing interest at the daily rate, round (5/4) the product (*i.e.*, the amount of interest computed) to the nearest whole cent.

For cumulative list of those federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, *see* *United States Attorneys' Bulletin*, Vol. 34, No. 1, Page 25, January 17, 1986.

LISTING OF ALL BLUESHEETS IN EFFECT
SEPTEMBER 26, 1986

AFFECTS USAM	TITLE NO.	DATE	SUBJECT
1-11.350	TITLE 1	5/06/86	Policy with Regard to Defense Requests for Jury Instruction on Immunized Witnesses
2-3.110	TITLE 2	2/03/86	Prompt Notification of Contrary Recommendations
9-1.177	TITLE 9	12/31/85	Authorization for Negotiated Concessions in Organized Crime Cases
9-2.132*	TITLE 9	12/31/85	Policy Limitations on Institution of Proceedings - Internal Security Matters
9-2.133*	TITLE 9	4/09/84	Policy Limitation on Institution of Proceedings, Consultation Prior to Institution of Criminal Charges
9-2.136	TITLE 9	6/04/86	Investigative and Prosecutive Policy for Acts of International Terrorism
9-2.151*	TITLE 9	12/31/85	Policy Limitations - Prosecutorial and Other Matters, International Matters
9-2.160	TITLE 9	7/18/85	Policy with Regard to Issuance of Subpoenas to Attorneys for Information Relating to the Representation of Clients
9-11.220 C.8.*	TITLE 9	4/14/86	All Writs Act Guidelines
9-11.368(A)*	TITLE 9	2/04/86	Amendment to Rule 6(e) Federal Rules of Criminal Procedure Permitting Certain Disclosure to State and Local Law Enforcement Officials
9-20.215*	TITLE 9	2/11/86	Policy Concerning State Jurisdiction Over Certain Offenses in Indian Reservations

* Approved by Advisory Committee, being permanently incorporated.
** In printing.

LISTING OF ALL BLUESHEETS IN EFFECT
SEPTEMBER 26, 1986

AFFECTS USAM	TITLE NO.	DATE	SUBJECT
9-103.132; 9-103.140	TITLE 9	6/30/86	Revisions to the Prosecutive Guidelines for the Controlled Substance Registrant Protection Act Concerning Consultation Prior to Prosecution
9-110.800	TITLE 9	7/07/86	Murder-for-Hire and Violent Crimes in Aid of Racketeering Activity
9-131.030	TITLE 9	5/13/86	Consultation Prior to Consultation
9-131.110	TITLE 9	5/13/86	Hobbs Act Robbery
10-2.186	TITLE 10	9/27/85	Grand Jury Reporters
10-2.534*	TITLE 10	3/20/86	Compensatory Time
10-2.614	TITLE 10	7/10/86	Non-Attorney Performance Rating Grievance Procedure
10-6.213*	TITLE 10	11/22/85	Reporting of Immediate Declinations of Civil Referrals
10-8.120*	TITLE 10	1/31/86	Policy Concerning Handling of Agency Debt Claim Referrals Where the Applicable Statute of Limitations has Run

UNITED STATES ATTORNEYS' MANUAL--TRANSMITTALS

The following United States Attorneys' Manual Transmittals have been issued to date in accordance with USAM 1-1.500.

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 1	(Transmittals A2 through A10 have been superseded.)			
	A11	2/22/84	2/10/84	Complete revision of Ch. 1, 2
	A12	3/19/84	2/17/84	Complete revision of Ch. 4
	A13	3/22/84	3/9/84	Complete revision of Ch. 8
	A14	3/23/84	3/9 & 3/16/84	Complete revision of Ch. 7, 9
	A15	3/26/84	3/16/84	Complete revision of Ch. 10
	A16	8/31/84	3/02/84	Complete revision of Ch. 5
	A17	3/26/84	3/26/84	Complete revision of Ch. 6
	A18	3/27/84	3/23/84	Complete revision of Ch. 11, 13, 14, 15
	A19	3/29/84	3/23/84	Complete revision of Ch. 12
	A20	3/30/84	3/23/84	Index to Title 1, Table of Contents to Title 1
	A21	4/17/84	3/23/84	Complete revision of Ch. 3
	A22	5/22/84	5/22/84	Revision of Ch. 1-6.200
	AAA1	5/14/84		Form AAA-1
	B1	7/01/85	8/31/85	Revision to Ch. 1-12.000
	B2	8/31/85	7/01/85	Revisions to Ch. 11
	B3	4/15/86	4/01/86	New Ch. 16
TITLE 2	(Transmittals A2 through A4 have been superseded.)			
	A5	2/10/84	1/27/84	Complete revision of Title 2-replaces all previous transmittals

*Transmittal is currently being printed.

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 2	A11	3/30/84	1/27/84	Summary Table of Contents to Title 2
	AAA2	5/14/84		Form AAA-2
TITLE 3	(Transmittal A2 has been superseded.)			
	A3	10/11/83	8/4/83	Complete revision of Title 3-replaces all previous transmittals
	AAA3	5/14/84		Form AAA-3
TITLE 4	(Transmittals A2 through A6 have been superseded.)			
	A7	4/16/84	3/26/84	Complete revision of Ch. 7, 8, 12
	A8	4/16/84	3/28/84	Complete revision of Ch. 2, 14, 15
	A9	4/23/84	3/28/84	Complete revision of Ch. 3
	A10	4/16/84	3/28/84	Complete revision of Ch. 10
	A11	4/30/84	3/28/84	Complete revision of Ch. 1, 9, Index to Title 4
	A12	4/21/84	3/28/84	Complete revision of Ch. 6
	A13	4/30/84	3/28/84	Complete revision of Ch. 4
	A14	4/10/84	3/28/84	Complete revision of Ch. 13
	A15	3/28/84	3/28/84	Complete revision of Ch. 5
	A16	4/23/84	3/28/84	Complete revision of Ch. 11
	AAA4	5/14/84		Form AAA-4
	B1	11/05/85	8/01/85	Revisions to Chapters 1-8, and 11-15
TITLE 5	(Transmittal A2 has been superseded.)			
	A3	3/22/84	3/5/84	Complete revision of Ch. 1, 2, 3 (was 2A)
	A4	3/28/84	3/12/84	Complete revision of Ch. 12 (was 9C)
	A4	undated	3/19/84	Complete revision of Ch. 5 (was Ch. 4), 6, 8

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 5	A5	3/28/84	3/20/84	Complete revision of Ch. 9, 11 (was 9B)
	A6	3/28/84	3/22/84	Complete revision of Ch. 7
	A7	3/30/84	3/20/84	Complete revision of Ch. 10 (was 9A)
	A8	4/3/84	3/22 & 3/26/84	Complete revision of Ch. 13, 14, 15, Table of Contents to Title 5
	A9	12/06/84	11/01/84	Revisions to Chapter 1
	A11	4/17/84	3/28/84	Complete revision of Ch. 4 (was Ch. 3)
	A12	4/30/84	3/28/84	Index to Title 5
	AAA5	5/14/84		Form AAA-5
	B1	6/03/85	5/01/85	Revisions to Ch. 1 and Ch. 4
TITLE 6	A2	3/23/84	3/2/84	Complete revision of Title 6-replaces all prior transmittals
	A3	12/19/84	12/14/84	Revision to Ch. 4 and Index
	AAA6	5/14/84		Form AAA-6
	B1	2/14/86	10/01/85	Revisions to Chapters 1-4, 6
TITLE 7	(Transmittals A2 and A3 have been superseded.)			
	A4	1/6/84	11/22/83	Complete revision to Title 7-replaces all prior transmittals
	A12	3/3/84	12/22/83	Summary Table of Contents to Title 7
	AAA7	5/14/84		Form AAA-7
	B1	3/24/86	3/05/86	Revision to Chapters 1-5
TITLE 8	AAA8	5/14/84		Form AAA-8
	B1	10/01/85	6/01/85	Complete revision to Title 8 (Supersedes A1, A2, and A12
TITLE 9	(Transmittals A5 through A12, A14, A47, A49 A50, A56 and A61 have been superseded.)			
	A13	1/26/84	1/11/84	Complete revision of Ch. 132, 133

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A14	2/10/84	1/27/84	Revisions to Ch. 1 (Superseded by A78)
	A15	2/1/84	1/27/84	Complete revision of Ch. 8
	A16	3/23/84	2/8/84	Complete revision of Ch. 135, 136
	A17	2/10/84	2/2/84	Complete revision of Ch. 39
	A18	2/3/84	2/3/84	Complete revision of Ch. 40
	A19	3/26/84	2/24/84	Complete revision of Ch. 21
	A20	3/23/84	2/8/84	Complete revision of Ch. 137, 138
	A21	3/19/84	2/13/84	Complete revision of Ch. 34
	A22	3/30/84	2/01/84	Complete revision of Ch. 14
	A23	8/31/84	2/16/84	Revisions to Ch. 2
	A24	3/23/84	2/28/84	Complete revision of Ch. 65
	A25	3/26/84	3/7/84	Complete revision of Ch. 130
	A26	3/26/84	2/8/84	Complete revision of Ch. 44
	A27	3/26/84	3/9/84	Complete revision of Ch. 90
	A28	3/29/84	3/9/84	Complete revision of Ch. 101
	A29	3/26/84	3/9/84	Complete revision of Ch. 121
	A30	3/26/84	3/19/84	Complete revision of Ch. 9
	A31	3/26/84	3/16/84	Complete revision of Ch. 78
	A32	3/29/84	3/12/84	Complete revision of Ch. 69
	A33	3/29/84	3/9/84	Complete revision of Ch. 102
	A34	3/26/84	3/14/84	Complete revision of Ch. 72
	A35	3/26/84	2/6/84	Complete revision of Ch. 37
	A36	3/26/84	2/6/84	Complete revision of Ch. 41
	A37	4/6/84	2/8/84	Complete revision of Ch. 139

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A38	3/29/84	2/28/84	Complete revision of Ch. 47
	A39	3/30/84	3/16/84	Complete revision of Ch. 104
	A40	4/6/84	3/9/84	Complete revision of Ch. 100
	A41	4/6/84	3/9/84	Complete revision of Ch. 110
	A42	3/29/84	3/14/84	Complete revision of Ch. 64
	A43	4/6/84	3/14/84	Complete revision of Ch. 120
	A44	4/5/84	3/21/84	Complete revision of Ch. 122
	A45	4/6/84	3/23/84	Complete revision of Ch. 16
	A46	2/30/84	2/16/84	Complete revision of Ch. 43
	A47	4/16/84	3/28/84	Revisions to Ch. 7 (Superseded by A63)
	A48	4/16/84	3/28/84	Complete revision of Ch. 10
	A49	4/16/84	3/28/84	Revisions to Ch. 63 (Superseded by A74)
	A50	4/16/84	3/28/84	Revisions to Ch. 66 (Superseded by A60)
	A51	4/6/84	3/28/84	Complete revision of Ch. 76, deletion of Ch. 77
	A52	4/16/84	3/30/84	Complete revision of Ch. 85
	A53	6/6/84	3/28/84	Revisions to Ch. 4
	A54	7/25/84	6/15/84	Complete revision of Ch. 11
	A55	4/23/84	4/6/84	Complete revision of Ch. 134
	A56	4/30/84	3/28/84	Revisions to Ch. 42 (Superseded by A87)
	A57	4/16/84	3/28/84	Complete revision of Ch. 60, 75
	A58	4/23/84	4/19/84	Summary Table of Contents of Title 9
	A59	4/30/84	4/16/84	Entire Index to Title 9

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A60	5/03/84	5/03/84	Complete revision of Ch. 66 (Supersedes A50)
	A61	5/03/84	4/30/84	Revisions to Ch. 1, section .103 (Superseded by A78)
	A62	12/31/84	12/28/84	Revisions to Ch. 123
	A63	5/11/84	5/9/84	Complete revision to Ch. 7 (Supersedes A47)
	A64	5/11/84	5/11/84	Revision to Ch. 64, section .400-700
	A65	5/17/84	5/17/84	Revisions to Ch. 120
	A66	5/10/84	5/8/84	Complete revision to Ch. 131
	A67	5/11/84	5/09/84	Revisions to Ch. 121, section .600
	A68	5/28/84	5/08/84	Revisions to Ch. 104
	A69	5/09/84	5/07/84	Revisions to Ch. 21, section .600
	A70	5/17/84	5/16/84	Revisions to Ch. 43, section .710
	A71	5/21/84	5/21/84	Complete revision of Ch. 20
	A72	5/25/84	5/23/84	Complete revision of Ch. 61
	A73	6/18/84	6/6/84	Complete revision of Ch. 17
	A74	6/18/84	6/7/84	Complete revision of Ch. 63 (Supersedes A49)
	A75	6/26/84	6/15/84	Complete revision of Ch. 27
	A76	6/26/84	6/15/84	Complete revision of Ch. 71
	A77	7/27/84	7/25/84	Complete revision of Ch. 6
	A78	9/10/84	8/31/84	Complete revision of Ch. 1 (Supersedes A14 and A61)
	A79	8/02/84	7/31/84	Complete revision of Ch. 18
	A80	8/03/84	8/03/84	Complete revision of Ch. 79

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	A81	8/06/84	7/31/84	Revisions to Ch. 7
	A82	8/02/84	7/31/84	Revisions to Ch. 75
	A83	8/02/84	7/31/84	Revisions to Ch. 90
	A84	9/10/84	9/7/84	Complete revision of Ch. 2
	A85	7/25/84	2/17/84	Revisions to Ch. 136
	A86	8/02/84	7/31/84	Revisions to Ch. 60
	A87	11/14/84	11/09/84	Revisions to Ch. 42 (Supersedes A56)
	A88	8/31/84	8/24/84	Complete revision of Ch. 12
	A89	12/31/84	12/31/84	Complete revision of Ch. 4
	A90	10/10/84	10/01/84	Complete revision of Ch. 73
	A91	12/12/84	11/23/84	Revisions to Ch. 70
	A92	12/14/84	11/09/84	Revisions to Ch. 75
	A93	12/31/84	12/06/84	Revisions to Ch. 7
	A94	12/20/84	12/14/84	Correction to Ch. 27
	AAA9	5/14/84		Form AAA-9
	B1	3/15/85	01/31/85	Revisions to Ch. 60
	B2	3/29/85	01/31/85	Revisions to Ch. 61
	B3	3/29/85	01/31/85	Revisions to Ch. 71
	B4	6/24/85	4/01/85	Revisions to Ch. 63
	B5	6/24/85	4/04/85	Revisions to Ch. 11
	B6	6/27/85	4/01/85	Revisions to Ch. 139
	B7	6/27/85	5/01/85	Revisions to Ch. 12
	B8	7/01/85	4/01/85	Revision to Ch. 4
	B9	7/31/85	7/31/85	Revision to Ch. 130
	B11	9/27/85	7/01/85	Revision to Ch. 27 and Ch. 38

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	B12	9/27/85	7/01/85	Revision to Ch. 2
	B13	10/01/85	7/01/85	Revision to Ch. 60
	B14	11/29/85	8/01/85	Revision to Ch. 2
	B15	10/21/85	7/01/85	Revision to Ch. 75
	B16	10/22/85	7/01/85	Revision to Ch. 64
	B17	10/21/85	8/30/85	Revision to Ch. 136
	B18	10/21/85	8/01/85	Revision to Ch. 63
	B19	11/05/85	8/01/85	Revision to Ch. 133
	B20	11/01/85	8/30/85	Revision to Ch. 134
	B21	11/05/85	8/01/85	Revision to Ch. 11
	B22	11/01/85	8/01/85	Revision to Ch. 61
	B23	11/20/85	11/05/85	Revision to Ch. 71
	B24	11/20/85	11/05/85	Revision to Ch. 46
	B25	11/01/85	8/01/85	Revision to Ch. 90
	B26	11/29/85	8/01/85	Revision to Ch. 138
	B27	11/01/85	8/01/85	Revision to Ch. 48
	B28	11/29/85	8/01/85	Revision to Ch. 65
	B29	11/01/85	11/05/85	Revision to Ch. 103
	B30	11/29/85	11/05/85	Revision to Ch. 49
	B31	11/01/85	8/01/85	Revision to Ch. 7
	B32	12/01/85	8/01/85	Revision to Ch. 40
	B33	11/01/85	8/01/85	Revision to Ch. 69
	B34	02/14/86	12/31/85	Revision to Ch. 20
	B35	12/31/85	8/01/85	Revision to Ch. 132
	B36	11/29/85	8/01/85	Revision to Ch. 110

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 9	B37	02/12/86	11/05/85	Revision to Ch. 8
	B38	3/20/86	12/31/85	Revision to Ch. 18
	B39	11/29/85	11/05/85	Revision to Ch. 60
	B40	02/12/86	11/05/85	Revision to Ch. 34
	B43	04/08/86	3/01/86	Revision to Ch.6
	B44	04/18/86	03/01/86	Revision to Ch. 111
	B45	04/08/86	3/01/86	Revision to Ch. 21
	B46	02/14/86	12/31/85	Revision to Ch. 42
	B47	04/08/86	3/01/86	Revision to Ch. 60
TITLE 10	(Transmittal A2 through A7 have been superseded.)			
	A8	4/5/84	3/24/84	Complete revision of Ch. 1
	A9	4/6/84	3/20/84	Complete revision of Ch. 7
	A10	4/13/84	3/20/84	Complete revision of Ch. 5
	A11	3/29/84	3/24/84	Complete revision of Ch. 6
	A12	4/3/84	3/24/84	Complete revision of Ch. 8
	A13	9/4/84	3/26/84	Complete revision of Ch. 10
	A14	4/23/84	3/28/84	Complete revision of Ch. 4
	A15	4/17/84	3/28/84	Complete revision of Ch. 3, 9
	A16	5/4/84	3/28/84	Index and Appendix to Title 10
	A17	3/30/84	3/28/84	Summary Table of Contents to Title 10
	A18	5/4/84	4/13/84	Complete revision to Ch. 2
	A19	5/02/84	5/01/84	Revisions to Ch. 4
	A20	8/31/84	5/24/84 & 7/31/84	Revisions to Ch. 2
	A21	6/6/84	5/1/84	Corrected TOC, Ch. 4 and pages 23, 24

TRANSMITTAL AFFECTING TITLE	NO.	DATE OF TRANSMITTAL	DATE OF TEXT	CONTENTS
TITLE 10	A22	7/30/84	7/27/84	Revision to Ch. 2
	A23	8/02/84	7/31/84	Revision to Ch. 2
	A24	11/09/84	10/19/84	Revision to Ch. 2
	A25	11/09/84	10/19/84	Revision to Ch. 2
	A26	11/28/84	11/28/84	Revision to Ch. 2
	A27	12/07/84	11/01/84	Revision to Ch. 2
	AAA10	5/14/84		Form AAA-10
	B1	3/15/85	1/31/85	Revision to Ch. 2
	B2	5/31/85	5/01/85	Revision to Ch. 2
	B3	6/27/85	4/01/85	Revision to Ch. 2
	B4	7/23/85	4/01/85	Revision to Ch. 4
	B5	02/20/86	01/27/86	Revision to Ch. 3
	B7	7/31/85	5/01/85	Revision to Ch. 2 Appendix--Form Index
	B8	11/01/85	8/16/85	Revisions to Ch. 2 and Ch. 8
	B9	11/01/85	8/16/85	Revision to Ch. 2
	B10	11/29/85	8/21/85	Revision to Ch. 2
	B11	11/29/85	8/16/85	Revision to Ch. 2
	B12	11/29/85	8/01/85	Revision to Ch. 2
	B14	11/29/85	8/01/85	Revision to Ch. 2
	B15	01/14/86	12/17/85	Revision to Ch. 2
	B17	03/01/86	12/31/85	Revision to Ch. 7
	B19	03/20/86	12/31/85	Revision to Ch. 5
	B21	04/15/86	04/01/86	Revision to Ch. 3
TITLE 1-10	A1	4/25/84	4/20/84	Index to USAM

If you have any questions regarding the above, please contact Judy Beeman at FTS 673-6348.

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TABLE OF CONTENTS

Page

COMMENDATIONS.. 289
  Justice Tom C. Clark and Younger Federal Lawyer Awards.................... 291

CLEARINGHOUSE
  FCC Expands Retention Period for Telephone Toll Records to 18 Months...... 291
  Guidelines for Obtaining Informal Immunity in Antitrust Cases............. 291
  Legal/Policy Advisory on Asset Forfeiture Matters......................... 292
  Tax Division Directive No. 86-59.. 292

POINTS TO REMEMBER
  Guidelines on INS Undercover Operations................................... 292
  Motions for Expungement of Arrest, Conviction and Related Criminal Records 293
  Personnel.. 294
  Rule 6(e): Grand Jury Secrecy--In Re Grand Jury Subpoena Duces Tecum..... 295
  Terrorist Acts Abroad Against United States Nationals - 18 U.S.C. §2331... 296

CASENOTES
  OFFICE OF THE SOLICITOR GENERAL... 297
  CIVIL DIVISION... 299
  LAND AND NATURAL RESOURCES DIVISION.. 302
  UNITED STATES ATTORNEYS' OFFICES... 304
  FEDERAL RULES.. 305

APPENDIX 307

VOL. 34, NO. 12 THIRTY-THIRD YEAR NOVEMBER 15, 1986

Please send change of address to Editor, United States Attorneys' Bulletin, Room 1136, Universal Building North, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

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COMMENDATIONS

The following Assistant United States Attorneys have been commended:

JAMES E. BERLINER and MAURICE A. LEITER (California, Central) by Commissioner Alan C. Nelson, Immigration and Naturalization Service, for their successful criminal prosecution of a complex immigration case.

STEPHEN J. CALVACCA (Florida, Middle) by Chief Darrell G. Smith, Criminal Investigation Division, Internal Revenue Service, for his successful prosecution of tax cases and his handling of complex IRS issues before federal grand juries.

H. WAYNE CAMPBELL and WALTER E. HERMAN III (Texas, Southern) by Inspector General William R. Barton, General Services Administration, for their successful efforts in the investigation and prosecution of a case involving violations of 18 U.S.C. §208 and §1503.

SANDRA W. CHERRY and KENNETH F. STOLL, along with United States Attorney GEORGE W. PROCTOR (Arkansas, Eastern) were awarded Certificates of Appreciation by Inspector General Robert W. Beuley, Department of Agriculture, for their successful handling of cases investigated and presented in the last fiscal year.

FRANK A. CONFORTI (Texas, Southern) by Regional Commissioner Stephen H. Martin, Immigration and Naturalization Service, for his presentation on "Justice Forfeiture" and "Equitable Transfer of Forfeited Property" at the INS Southern Region Vehicle Seizure/Forfeiture Conference.

JON R. COOPER (Arizona) by Supervising Senior Resident Agent Richard M. Rogers, Federal Bureau of Investigation, for his successful prosecution of a child molestation case, which occurred on an Indian Reservation.

J. STEPHEN CZULEGER (California, Central) by Attorney General Edwin Meese III for his fine job in the extradiction case of a Mexican national.

TERRY L. DERDEN (Arkansas, Eastern) by Special Agent-in-Charge Don K. Pettus, Federal Bureau of Investigation, for his outstanding contributions to the Arkansas Organized Crime Drug Enforcement Task Force.

JOHN M. FACCIOLA (District of Columbia) by Mr. Donald D. Engen, Administrator, Federal Aviation Administration, for his successful efforts in a "disappointed bidder" case involving the award of an $18.1 million contract.

WILLIAM F. FAHEY (California, Central) by Director William H. Webster, Federal Bureau of Investigation, for his exceptional handling of the investigation and prosecution of the national gemstone boiler room operation case.

BRIAN J. HENNIGAN (California, Central) by Special Agent-in-Charge Richard T. Bretzing, Federal Bureau of Investigation, for his excellent prosecutive skills in four complex fraud cases.

MEL S. JOHNSON (Wisconsin, Eastern) by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his outstanding contributions and extraordinary efforts in major fraud against the government prosecutions.

TIMOTHY JOHNSON (Texas, Southern) by Special Agent-in-Charge W. Douglas Gow, Federal Bureau of Investigation, for his outstanding courtroom performance in an 18 U.S.C. §2113 (a) and (d) violations case.

DAVID A. KATZ (California, Central) by Special Agent-in-Charge Richard T. Bretzing, Federal Bureau of Investigation, for his successful prosecution of a case involving mail and wire fraud, interstate transportation of stolen property, and conspiracy; and by Inspector-in-Charge W.J. Maisch, United States Postal Service, for his prosecutive competence in a postal robbery case.

RICHARD D. LETTS (Ohio, Southern) by Assistant Secretary for Labor-Management Standards Salvatore R. Martoche, Department of Labor, for his successful prosecution of a case involving violations of the Labor-Management Reporting and Disclosure Act of 1959.

WILMA A. LEWIS (District of Columbia) by Inspector General Frank S. Sato, Veterans Administration, and was awarded the VA's Certificate of Appreciation for her outstanding efforts on behalf of the Office of Inspector General.

MARK E. NAGLE (District of Columbia) by Director Thomas J. O'Brien, Defense Investigative Service, Department of Defense, for his superb handling of a case involving the Defense Industrial Security Program.

KATHLEEN A. O'MALLEY (Florida, Middle) by Director John R. Simpson, United States Secret Service, Department of the Treasury, and was awarded the Secret Service Certificate of Appreciation for her outstanding assistance to the Secret Service over the past two years.

STEPHEN L. PURCELL (Florida, Middle) by Chief Darrell G. Smith, Criminal Investigation Division, Internal Revenue Service, for his exceptional performance in prosecuting several criminal tax cases.

VICTORIA A. ROBERTS (Michigan, Eastern) by Associate Deputy Under Secretary Lawrence W. Rogers, Department of Labor, for her excellent efforts in a Reduction-in-Force case.

DEBORAH L. ROBINSON (District of Columbia) by General Counsel Donald L. Ivers, Veterans Administration, for her skillful and successful defense of a technically complex case affecting a VA ADP procurement.

SOLOMON E. ROBINSON (California, Eastern) by Brigadier General James W. Hopp, United States Air Force, for his excellent handling of a discrimination case.

JAMES C. SABALOS (Texas, Southern) by Mr. William H. Webster, Director, Federal Bureau of Investigation, for his outstanding prosecutive efforts in a theft from Interstate Shipment case.

MARK ST. ANGELO (California, Eastern) by Lieutenant Commander G.R. Bartleson, Naval Auxiliary Landing Field, Department of the Navy, for his dedication and outstanding work in the Stanislaus County landfill expansion settlement agreement.

RONALD K. SILVER (California, Central) by Superintendent H. Gilbert Lusk, Glacier National Park, National Park Service, for his excellent work in the Hilligoss-Lordan bear mauling case.

Justice Tom C. Clark and Younger Federal Lawyer Awards.

Deputy Attorney General Arnold I. Burns acknowledges and congratulates DAVID J. ANDERSON, a Director of the Federal Programs Branch, Civil Division, and the 1986 recipient of the Justice Tom C. Clark Award. Mr. ANDERSON was recognized for his many outstanding achievements as a litigator and supervisory attorney during more than twenty years of service with the Civil Division. His active role and achievements in defining the scope of Executive Powers, including those involving foreign relations and national security interests of the United States, were particularly noteworthy.

Deputy Attorney General Burns also commended the following attorneys for their highly commendable performance and achievements which distinguished them for nomination for the Younger Federal Lawyer Award:

DEAN S. COOPER, Trial Attorney, Commercial Litigation Branch, Civil Division.
NANCY B. FIRESTONE, Deputy Section Chief, Environmental Enforcement Section, Land and Natural Resources Division.
MARTIN F. HEALY, Assistant United States Attorney, California, Northern
VIRGINIA A. MATHIS, Assistant United States Attorney, Arizona
ANN C. ROWLAND, Assistant United States Attorney, Ohio, Northern

CLEARINGHOUSE

Federal Communications Commission Expands the Retention Period for Telephone Toll Records to 18 Months.

On August 22, 1986, the Federal Communications Commission (FCC) revised 47 C.F.R. Part 42, Preservation of Records of Communication Common Carriers. The revised regulations require that each carrier retain for a period of 18 months such records as are necessary to provide billing information about telephone toll calls such as name, address and number of caller, telephone number called, date, time, and length of call. The previous record retention period was limited to six months.

A copy of the proposed regulations can be obtained from the Office of Legal Services on FTS 633-4024. Please request item number CH-39.

Guidelines for Obtaining Informal Immunity in Antitrust Cases.

By memorandum dated July 24, 1986, to all Antitrust Division attorneys, Assistant Attorney General Douglas H. Ginsburg authorized the use of informal immunity in Antitrust Division criminal investigations and cases for a one-year trial period.

The memorandum sets forth guidelines which detail the procedures for obtaining authority to grant informal immunity and under what circumstances such a grant may be appropriate. The guidelines require that the appropriate United States Attorney should be notified before granting informal immunity. The notification will generally be in writing if time permits, but oral notification may be permissible.

The memorandum and guidelines previously circulated to all United States Attorneys can be obtained through the Office of Legal Services on FTS 633-4024. Please request item number CH-40.

Legal/Policy Advisory on Asset Forfeiture Matters.

A copy of the following advisory, prepared by the Asset Forfeiture Office of the Criminal Division, may be obtained from the Executive Office for United States Attorneys. Please contact the Office of Legal Services on FTS 633-4024, and request item number CH-41.

L86-7 September 9, 1986, memorandum from Brad Cates, Director, Asset Forfeiture Office, to William Snider, Associate Chief Counsel, Drug Enforcement Administration, re: "Sharing of Seized Property With Participating Non-DOJ Federal Agencies."

Tax Division Directive No. 86-59.

Tax Division Directive No. 86-59, signed by Assistant Attorney General Roger M. Olsen, went into effect October 1, 1986. The Directive was teletyped, in its entirety, to United States Attorneys' offices on October 1, 1986. The Directive delegates authority to approve requests seeking to expand a nontax grand jury investigation to include inquiry into possible federal criminal tax violations to the following:

1. Any United States Attorney appointed under 28 U.S.C. §541.

2. Any Attorney-in-Charge of a Criminal Division Organized Crime Strike Force established pursuant to 28 U.S.C. §510.

3. Any independent counsel appointed under 28 U.S.C. §593.

It is advised that the Directive be read in its entirety. A copy of the Directive can be obtained from the Office of Legal Services, at FTS 633-4024. Please request item number CH-42.

POINTS TO REMEMBER

Guidelines on INS Undercover Operations.

Immigration and Naturalization Service (INS) guidelines on the use of undercover operations have been in effect since March 19, 1984. The guidelines cover all INS undercover operations, and separates them into three categories: (1) undercover operations which must be authorized by the INS Commissioner with the concurrence of the Assistant Attorney General for the Criminal Division; (2) undercover operations which must be authorized by the appropriate Regional Commissioner; and (3) undercover operations which must be approved by the appropriate District Director or Chief Patrol Agent. The guidelines also create an Undercover Operations Review Committee comprised of INS personnel and Criminal Division attorneys to review and vote on operations requiring central office approval.

An "undercover operations" is defined in the guidelines to mean "any investigative operation in which an undercover employee or cooperating private individual is used." The Undercover Operations Review Committee's understanding as to what constitutes an "investigative operation," is set forth in an INS memorandum dated August 28, 1986. A copy of the guidelines and the August 28 memorandum is being mailed to each United States Attorney's office by the General Litigation and Legal Advice Section of the Criminal Division. United States Attorneys are encouraged to make these documents available to their Assistants.

Contact the General Litigation and Legal Advice Section of the Criminal Division, at FTS 724-7144, with any questions concerning the INS undercover operations guidelines.

(Criminal Division)

Motions for Expungement of Arrest, Conviction and Related Criminal Records Maintained by Military and Civilian Law Enforcement Agencies.

United States Attorneys are reminded that motions to expunge arrest, conviction, and related criminal justice records should be vigorously opposed unless in the discretion of the United States Attorney, the interests of justice clearly require expungement. Normally, the interests of justice will not require expungement unless the basis for expungement is one which is set forth in the cases referenced below. This policy pertains to records of all criminal investigations conducted by the armed services and civilian agencies.

In arguing against expungement, United States Attorneys should stress the practical necessity for the maintenance of criminal intelligence information for use in the apprehension of criminals and the detection of future crime. Congress has authorized the collection and maintenance of this important information, 28 U.S.C. §534, and the retention of arrest and conviction records, fingerprints, and photographs promotes effective law enforcement. *See*, *Stevenson v. United States*, 380 F.2d 590, 594 n.12 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 962 (1967) (fingerprints); *Herschel v. Dyra*, 365 F.2d 17, 20 (7th Cir. 1966), *cert. denied*, 385 U.S. 973 (1966) (arrest records); *Thom v. New York Stock Exchange*, 306 F. Supp. 1002 (S.D. N.Y. 1969), *affirmed sub nom.*, *Miller v. New York Stock Exchange*, 425 F.2d 1074, 1075 (2d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970) (fingerprints). These records provide legitimate leads and background information and may be an important factor in resolving criminal cases. The retention of criminal information records enables military and civilian law enforcement officials to utilize more efficiently their facilities for combatting crime and is vital in curbing the growth of crime. *See*, *Natwig v. Webster*, 562 F. Supp. 225, 229 (D. R.I. 1983) (arrest records), *quoting* *United States v. Rosen*, 343 F. Supp. 804, 809 (S.D. N.Y. 1972) (fingerprints, photographs and "any other arrest records").

While the courts have recognized that they possess "ancillary," "inherent" or "general" power to order the expunction of arrest, indictment, conviction and related criminal justice records, *see*, *United States v. G*, 774 F.2d 1392, 1394 (9th Cir. 1985); *Doe v. Webster*, 606 F.2d 1226, 1230 n.8 (D.C. Cir. 1979); *Natwig v. Webster*, *supra* at 227, a court's remedial power is not unlimited. There must be a logical relationship between the injury and the requested remedy. *Doe v. Webster*, 606 F.2d at 1231.

An individual is not entitled to expungement of an otherwise legal arrest record simply because the charges are subsequently dismissed or a trial ends in acquittal. *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *United States v. Linn*, 513 F.2d 925 (10th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975); *Rowlett v. Fairfax*, 446 F. Supp. 186 (W.D. Mo. 1978); *Coleman v. Department of Justice*, 429 F.Supp. 411 (N.D. Ind. 1977); *Hammons v. Scott*, 423 F. Supp. 625 (N.D. Cal. 1976); *United States v. Seasholtz*, 376 F. Supp. 1288 (N.D. Okl. 1974); *United States v. Dooley*, 364 F. Supp. 75 (E.D. Pa. 1973); *United States v. Rosen*, *supra*.

Expungement of arrest records is the appropriate remedy, however, where the arrest is unconstitutional, *Maurer v. Los Angeles County Sheriff's Department*, 691 F.2d 434 (9th Cir. 1982); *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 880 (1973); where the arrest occurred under an unconstitutional statute, *Kowall v. United States*, 53 F.R.D. 211 (W.D. Mich. 1971); where the arrest was made with an illegitimate motive or for purposeful harassment, *United States v. McLeod*, 385 F.2d 734, 749-750 (5th Cir. 1967); *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D. N.C. 1969); where there was a mass arrest without probable cause, *Bilick v. Dudley*, 356 F. Supp. 945, 952 (S.D. N.Y. 1973); or where there was detention that fell short of an arrest, *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

Likewise, expungement of conviction records will occur where the conviction is illegal, *Kowall v. United States*, *supra*; or unconstitutional, *Severson v. Duff*, 322 F. Supp. 4 (M.D. Fla. 1970), *but see*, *Rogers v. Slaughter*, 469 F.2d 1084 (5th Cir. 1972); where the conviction resulted from government misconduct, *United States v. Benlizar*, 459 F. Supp. 614 (D.C. Cir. 1978); or where a youth is wrongly tried as an adult, *Grandison v. Warden*, 423 F. Supp. 112 (D. Md. 1976).

(Criminal Division)

Personnel.

Effective September 29, 1986, Christopher D. Hagen was court-appointed United States Attorney for the Southern District of Iowa.

Effective September 30, 1986, George J. Terwilliger was court-appointed United States Attorney for the District of Vermont.

Effective October 3, 1986, D. Michael Crites was court-appointed United States Attorney for the Southern District of Ohio.

Effective October 10, 1986, Robert S. Mueller III was court-appointed United States Attorney for the District of Massachusetts.

Effective October 15, 1986, Robert L. Barr, Jr. took the Oath of Office as the Presidentially-appointed United States Attorney for the Northern District of Georgia.

Effective October 15, 1986, Charles W. Larson was court-appointed United States Attorney for the Northern District of Iowa.

(Executive Office)

Rule 6(e): Grand Jury Secrecy -- In Re Grand Jury Subpoena Duces Tecum, dated January 15, 1986, 797 F.2d 676 (8th Cir. 1986).

On July 29, 1986, the Eighth Circuit decided a case of first impression in the courts of appeals that will provide federal prosecutors with an important weapon in guarding the secrecy of grand jury proceedings against the risk of disclosure by grand jury witnesses. In In Re Grand Jury Subpoena Duces Tecum, dated January 15, 1986, 797 F.2d 676 (8th Cir. 1986), the district court had previously denied the government's motion for a temporary secrecy order to prevent a financial records custodian from informing its customers that their records had been subpoenaed by a federal grand jury. On appeal, however, the Eighth Circuit held that, in enacting Federal Rules of Criminal Procedure 6(e)(2)'s general prohibition against imposing secrecy obligations on grand jury witnesses, Congress did not "intend . . . to bar the district courts from imposing a reasonable obligation of secrecy on grand jury witnesses in an appropriate case." As the court noted, Rule 6(e)'s secrecy provisions were aimed at ensuring that targets could not escape, influence grand jurors, or intimidate witnesses. If grand jury witnesses were accorded "unrestricted freedom to communicate" with targets concerning on-going investigations, "the entire purpose of grand jury secrecy" would be "completely undercut." Accordingly, where there is a particularized showing that the need for secrecy outweighs Rule 6(e)(2)'s countervailing policy, the Eighth Circuit held that "the district court may direct a grand jury witness to keep secret from targets of the investigation the existence of a subpoena, the nature of documents subpoenaed, or testimony before the grand jury."

Two questions remain unanswered by the court's decision. First, since the court did not reach the question, it is unclear how much evidence the government must present to demonstrate a "particularized need" for the issuance of a secrecy order. In this case, the government offered general averments concerning the risk of flight, the destruction of evidence, and witness intimidation, along with a more specific but nonetheless conclusory allegation that a primary witness believed his life to be in danger; presumably, greater specificity will be required to meet the "particularized need" standard. Second, the court focused solely on the matter of disclosures by witnesses to the targets of grand jury investigations. It did not, as such, address the question whether secrecy orders would ever be appropriate to prohibit disclosures to non-targets. The court did, however, at least intimate that a different result might follow if the government sought to impose a witness secrecy obligation with respect to such non-targets as an attorney or other associate of the witness. Such a limitation on the scope of the Eighth Circuit's holding would certainly be consistent with the legislative history accompanying Rule 6(e)(2), which was enacted to eliminate the "unnecessary hardship and . . . injustice" that may result "if a witness is not permitted to make disclosure to counsel or to an associate."

In sum, it is important that Department attorneys conducting grand jury proceedings be aware that such orders are available to protect the secrecy and the integrity of their grand jury investigations. At the same time, such secrecy orders should not be routinely sought, but only in those instances in which a particularized showing can be made regarding the risks of flight, grand juror influence or intimidation, witness intimidation, or the destruction of evidence. As in In Re Grand Jury Subpoena Duces Tecum, Dated January 15, 1986, such showings should be made by affidavit or testimonial evidence in an *ex parte*, *in camera* proceeding. Moreover, given the Eighth Circuit's dicta and Rule 6(e)(2)'s legislative history, future requests for secrecy orders should prudently focus on the kind of disclosures that will directly or indirectly benefit the target of the investigation; they should not seek to prohibit a witness's disclosures to his own attorney or associates.

Questions concerning this case may be directed to Robert Erickson, Appellate Section, Criminal Division, on FTS 633-2841.

(Criminal Division)

Terrorist Acts Abroad Against United States Nationals - 18 U.S.C. §2331.

Section 1202 of the Omnibus Diplomatic Security and Anti-terrorism Act of 1986, Pub. L. No. 99-399, August 28, 1986, creates a new chapter 113A - Extraterritorial Jurisdiction Over Terrorist Acts Abroad Against United States Nationals - in Title 18, United States Code. Section 2331 of the new chapter establishes four new extraterritorial federal offenses. Any prosecution under Section 2331 requires the written certification of the Attorney General or the Associate Attorney General that in his/her judgment the offense was intended to coerce, intimidate, or retaliate against a government or a civilian population. The new provisions are not intended to reach non-terrorist violence inflicted upon American victims. Consistent with the provisions of USAM 9-2.136, no investigative action under 18 U.S.C. §2331 is to be undertaken by any United States Attorney without the express authorization of the Assistant Attorney General of the Criminal Division. The main provisions of Section 2331 are:

(1) Subsection (a) makes it a crime to kill a national of the United States while such national is outside the United States. If the killing is a murder as defined in 18 U.S.C. §1111(a), the penalty is a fine of up to $250,000 or imprisonment for any term of years or for life, or both fine and imprisonment. If the killing is a voluntary manslaughter as defined in 18 U.S.C. §1112(a), the penalty is a fine of up to $250,000 or imprisonment for not more than ten years, or both. If the killing is involuntary manslaughter as defined in 18 U.S.C. §1112(a), the penalty is a fine of up to $250,000 or imprisonment for not more than three years, or both.

(2) Subsection (b) creates an offense for an attempted murder outside the United States of a United States national and establishes the penalty as a fine of up to $250,000 or imprisonment not for more than 20 years, or both.

(3) Subsection (b) also makes it an offense to conspire outside of the United States to murder a United States national. The location of the targeted national can be inside or outside of the United States. The conspiracy requires an overt act. The penalty is a fine of up to $250,000 or imprisonment for any term of years or for life, or both.

(4) Subsection (c) makes it a crime to engage in physical violence outside the United States with the intent to cause serious bodily injury to a national of the United States or with the result that serious bodily injury is caused to a national of the United States. Hence, blowing up a building or vehicle with such intent or result would be covered. The penalty is a fine of up to $250,000 or imprisonment for not more than five years, or both.

(5) Subsection (d) defines "national of the United States" to have the meaning given such term in Section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. §1101(a)(22)).

(6) Subsection (e) requires prior to prosecution the written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions. Under the present division of responsibilities, the latter official is the Associate Attorney General. The certifying official must find that in his/her judgment, the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population." The required certification is to ensure that the statute is used to prosecute terrorists and not persons who injure or kill Americans overseas in barroom brawls or normal street crime. The offense itself, however, does not require any proof of the terrorist motive for the murder or injury. The determination of the certifying official is final and is not subject to judicial review. The term "civilian population" includes the general population as well as other specific identifiable segments of society, such as the membership of a religious faith or of a particular nationality. Neither the targeted government nor civilian population, or segment thereof, has to be that of the United States.

The section became effective on August 28, 1986, and the Attorney General certified its use for the prosecution of the four surviving hijackers of Pan American Flight 73 in Karachi, Pakistan, on September 5, 1986.

Contact Karen A. Morrissette (FTS 724-5840) or Stephen M. Weglian (FTS 724-7526), General Litigation and Legal Advice Section, Criminal Division, with any questions about this new statute.

(Criminal Division)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A petition for certiorari in United States v. Coalition to Preserve the Integrity of American Trademarks, 790 F.2d 903 (D.C. Cir. 1986). The question presented is whether a Customs Service regulation that permits the importation of "grey market" goods is valid under Section 526 of the Tariff Act of 1930, 19 U.S.C. §1526.

A petition for certiorari in Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986). The issues are (1) whether 8 U.S.C. §1182(a)(27) allows exclusion of an alien only if (a) his activities, and not his mere presence or entry, would endanger the public welfare or (b) the affiliation of an organization listed in 8 U.S.C. §1182(a)(28) with a foreign country is an independent reason for his exclusion, beyond his mere membership in the organization; (2) whether the exclusion of aliens in this case violates plaintiffs' First Amendment rights; and (3) whether the delegation of power to the Executive Branch in 8 U.S.C. §1182(a)(27) violates principles of separation of powers.

A petition for certiorari in *NLRB v. United Food and Commercial Workers Union*, 788 F.2d 178 (3d Cir. 1986). The questions are (1) whether the withdrawal of an unfair labor practice complaint by the General Counsel of the National Labor Relations Board pursuant to an informal settlement agreement entered into prior to the commencement of a hearing on the complaint constitutes agency action subject to judicial review; and (2) if so, whether the General Counsel must hold an evidentiary hearing whenever the party who filed the unfair labor practice charge objects to the settlement and requests such a hearing.

A petition for certiorari in *INS v. Flores*, 786 F.2d 1242 (5th Cir. 1986). The question presented is whether an alien's burden of proving eligibility for asylum under Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1158(a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h).

A petition for certiorari in *Commissioner of Internal Revenue v. Fink*, 789 F.2d 427 (6th Cir. 1986). The issue is whether a non-pro-rata surrender of stock gives rise to an immediate loss deduction under Section 165 of the Internal Revenue Code.

A petition for certiorari in *United States v. Robinson*, 794 F.2d 1132 (6th Cir. 1986). The issues are (1) whether the prosecutor's comments at trial violated the rule of *Griffin v. California*, 380 U.S. 609 (1965); and (2) whether Federal Rules of Criminal Procedure 52(b) applies to constitutional errors.

A petition for certiorari in *Commissioner of Internal Revenue v. Illinois Cereal Mills*, 789 F.2d 1234 (7th Cir. 1986). The question is whether 95% of the electrical power in a new factory used to operate machinery means that 95% of the installation cost of the factory's electrical system qualifies for the investment tax credit under Section 48 of the Internal Revenue Code.

A petition for certiorari in *Tisch v. Shidaker*, No. 84-2791 (7th Cir. Jan. 29, 1986). The question presented is whether a plaintiff can establish a Title VII cause of action based on alleged disparate impact resulting from a subjective promotion practice or procedure.

Petitions for certiorari in *Erwin v. Westfall*, 785 F.2d 1551 (11th Cir. 1986), and *Deschambault v. Sowell*, 791 F.2d 170 (11th Cir. 1986). The question is whether a federal employee who exercises operational rather than policy level discretion is entitled to absolute immunity from liability for common law torts that he commits while acting within the scope of his official duties.

A brief amicus curiae in *Young v. United States ex rel. Vuitton et Fils S.A.*, 780 F.2d 179 (2d Cir. 1985). The issue is whether, consistent with the Due Process Clause of the Fifth Amendment and Federal Rules of Criminal Procedure 42(b), a private party may prosecute criminal contempt proceedings.

A brief amicus curiae in *Iowa Mutual Insurance Co. v. LaPlante*, 774 F.2d 1174 (9th Cir. 1985). The question is whether, in an action brought by a citizen of one state against tribal Indians resident in another state, where the events giving rise to the cause of action centered on the reservation and are the subject of a claim pending before the tribal court, the federal district court should refrain from exercising diversity jurisdiction unless the tribal court proceedings have been completed and the tribal court had no jurisdiction.

A brief amicus curiae in Burlington Northern R.R. Co. v. Oklahoma Tax Commission, No. 85-1657 (10th Cir. 1986). The question presented is whether Section 306 of the Railroad Revitalization and Regulatory Reform Act exempts discriminatory taxation resulting from overvaluation of railroad property unless the railroad makes a prima facie showing before trial of "purposeful overvaluation with discriminatory intent."

A jurisdictional statement in United States v. Amos, Civ. No. C-83-0492W (D. Utah May 16, 1986). The issue is whether Section 702 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, which exempts all activities conducted by religious organizations from the statutory prohibition against discrimination in employment on the basis of religion, is invalid under the Establishment Clause of the First Amendment.

Jurisdictional statements in Bowen v. Gilliard, 633 F. Supp. 1529 (W.D.N.C. 1986), and Bowen v. Lesko, No. 85-C-1600 (E.D. Wis. 1986). The issue is whether Section 402(a)(38) of the Social Security Act, 42 U.S.C. §602(a)(38), which requires that all parents, brothers and sisters who live together be included within a single filing unit for AFDC purposes, violates the Takings Clause, the Due Process Clause, or the Equal Protection component of the Fifth Amendment.

CIVIL DIVISION

D.C. CIRCUIT AFFIRMS SANCTION DISMISSAL OF SUIT AGAINST THE GOVERNMENT FILED BY THE FOUNDING CHURCH OF SCIENTOLOGY.

In 1978, the Founding Church of Scientology alleged that the government was violating its constitutional rights and its related scientology churches and missions by illegal investigative activities and harassment of those organizations. Following the criminal convictions of nine Church officials for theft of government property and other illegal activities against the government, the government raised a defense of unclean hands. The government then sought discovery with respect to that defense, including the deposition of L. Ron Hubbard, the founder and leader of Scientology. The government contended that Hubbard was a managing agent of the Church, that he was the official responsible for the criminal activities which led to the convictions of the high-ranking officials, and that he was in the best position to provide testimony on those matters. The district court found the government's evidence established a prima facie showing that Hubbard remained in control at least through the early 1980's, and ordered Hubbard to appear for a limited purpose deposition to explore his relationship to the Church. The Church failed to produce Hubbard. The court, finding the failure to appear a wilful refusal to comply, dismissed the action pursuant to Rule 37, Federal Rules of Civil Procedure.

The D.C. Circuit affirmed the district court as to the underlying status of Hubbard as managing agent, and found no abuse of discretion in the dismissal as a sanction.

Founding Church Of Scientology v. FBI, ___F.2d___, No. 85-5885 (D.C. Cir. Sept. 26, 1986). D. J. # 145-12-3526. Attorneys: Barbara Herwig (FTS 633-5425) and Freddi Lipstein (FTS 633-4815), Civil Division.

D.C. CIRCUIT HOLDS THAT 1985 AMENDMENTS TO THE EQUAL ACCESS TO JUSTICE ACT APPLY RETROACTIVELY TO CASES PENDING ON FEES ALONE ON THE DATE OF ENACTMENT OF THE AMENDMENTS.

The Equal Access to Justice Act, 28 U.S.C. §2412(d), provides that a prevailing party is entitled to attorney's fees from the government unless the "position of the United States was substantially justified." In one of the leading cases under the original EAJA, the D.C. Circuit had accepted our argument that the phrase "position of the United States" referred only to the position taken in the litigation, and not to any pre-litigation actions. The EAJA 1985 amendments supplemented the phrase "position of the United States" to make it clear that prelitigation actions must be considered in making the substantial justification determination. The D.C. Circuit held that the amended definition of "substantial justification" applies to a case that was pending on fees alone on August 5, 1985, the date the amendments were enacted. The court, thus, rejected the government's argument that the 1985 amendments, including the amendment to the "substantial justification" provision, should only apply to cases pending on the merits on August 5, 1985. The court remanded this particular case for a determination by the district court under the amended law.

Center For Science In The Public Interest v. Regan, ___F.2d___, No. 83-1988 (D.C. Cir. Sept. 26, 1986). D. J. # 145-3-2423. Attorneys: William Kanter (FTS 633-1597) and Marleigh D. Dover (FTS 633-4820), Civil Division.

FOURTH CIRCUIT UPHOLDS ACCESS BY CIVIL DIVISION TO GRAND JURY MATERIALS IN CIVIL FRAUD PROSECUTION OF LITTON SYSTEMS, INCORPORATED.

After building submarines for the Navy, Litton made claims for reimbursement of millions of dollars, which the government believed fraudulent. Litton was then the subject of a lengthy grand jury investigation, and was indicted, but acquitted of criminal charges of wrongdoing. However, the government decided to pursue Litton in the Claims Court for civil common law and False Claims Act remedies. As part of that process, the government filed a motion in district court seeking access to the grand jury materials involving Litton, which had been turned over to Litton. The district court granted the motion and Litton appealed, alleging a variety of counts of government misconduct and misuse of the grand jury for civil purposes. The Fourth Circuit affirmed, rejecting all of Litton's claims. The court held that the proper standard of review is whether the district court abused its discretion in granting access. No such abuse was present here because the grand jury was over, the matter had been thoroughly aired during the lengthy criminal proceedings.

In re Grand Jury Proceedings, Litton Systems Inc., ___F.2d___, No. 85-5289 (4th Cir. Sept. 12, 1986). D. J. # 145-0-1878. Attorneys: Leonard Schaitman (FTS 633-3441) and Douglas N. Letter (FTS 633-3602), Civil Division.

FIFTH CIRCUIT RULES THAT VETERANS ADMINISTRATION APPRAISAL PRACTICES DID NOT DISCRIMINATE AGAINST PLAINTIFF HOME BUYERS, SELLERS, AND CIVIC ASSOCIATION IN BLACK HOUSTON NEIGHBORHOOD.

Plaintiff home buyers, sellers, and civic association in the predominantly black MacGregor neighborhood of Houston brought suit under several statutes charging that the VA had discriminated in its appraisal practices based on the composition of the neighborhood. In essence, the plaintiffs claimed that VA fee appraisers artificially lowered the values they assigned to homes in MacGregor based on race. Plaintiffs presented statistics allegedly showing that the VA underappraised 86% of the time in the MacGregor neighborhood but only 29% of the time in a supposedly comparable white neighborhood.

Without specifically addressing the statistical evidence, the district court dismissed the suit on numerous grounds, including failure to establish discriminatory intent or effect. In its primary argument, the government pointed out that plaintiffs statistical showing was inadequate in many respects, including, inter alia, that the samples were too small and lacked proper control information. The data was insufficient to demonstrate discriminatory effect; and the government's statistics demonstrated adherence to legitimate, race-neutral, appraisal practices. Notwithstanding the plaintiffs' statistical evidence and expert testimony, the Fifth Circuit found no discriminatory intent or effect, supporting the district court's decision.

Hanson v. Veterans Administration, ____ F.2d ____, No. 85-2618 (5th Cir. Sept. 29, 1986). D. J. # 151-74-1154. Attorneys: Robert S. Greenspan (FTS 633-5428) and Marilyn S.G. Urwitz (FTS 633-4549), Civil Division.

EN BANC SIXTH CIRCUIT RULES THAT COURTS MUST REVIEW APPEALS COUNCIL'S DECISION, NOT ALJ'S TO DETERMINE WHETHER FINAL DECISION OF THE SECRETARY IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN SOCIAL SECURITY DISABILITY CASES

Two panels of the Sixth Circuit had ruled that in Social Security disability cases, where the ALJ had rendered a decision favorable to the claimant which was then reversed by the Appeals Council, the courts must review the ALJ's decision, not the Appeals Council's, to determine whether substantial evidence supported the Secretary's final decision. This ruling was based on the Court's interpretation of the Secretary's regulations; the panels had rejected the Secretary's interpretation.

On rehearing en banc, the court fully sustained the Secretary's interpretation of his regulations. Thus, the court ruled that, under his regulations, the Secretary--through the Appeals Council--has full authority to review and to reverse any ALJ decision. The court further stated that if there is judicial review, the courts must review the Appeals Council's decision, not the ALJ's, to determine whether substantial evidence supports the Secretary's final decision.

Mullen and Shepherd v. Bowen, ___ F.2d ___, Nos. 84-1455 and 84-5352 (6th Cir. Sept. 2, 1986). D. J. # 137-38-621 and 137-30-1767. Attorneys: William Kanter (FTS 633-1597) and Howard Scher (FTS 633-4820), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

INDIAN TRIBE LACKS JURISDICTION TO ENJOIN FEDERAL OFFICIALS FROM RELOCATING IRRIGATION CANAL ON LANDS BELONGING TO TWO INDIANS.

The Yakima tribal court entered a permanent restraining order preventing federal officials from relocating an irrigation canal on lands belonging to two Yakima Indians, the Sohappys. The district court granted the government's motion for summary judgment, voiding the restraining order on the ground that the tribal court lacked jurisdiction to enjoin federal officials from performing their official duties.

The Ninth Circuit affirmed, holding: (1) The appeal was not moot, even though settlement had been reached wherein the Interior Department paid the Sohappys for a right-of-way, because in order to decide the validity of the tribal court's order, the merits had to be considered. (2) The district court had jurisdiction to determine limits of tribe's powers over federal officials. (3) The federal official involved was acting within the scope of his delegated authority, and the tribal court action was an unconsented suit against the United States barred by sovereign immunity. (4) The United States was not required to exhaust tribal court remedies inasmuch as the tribal court lacked jurisdiction; the United States could override tribal immunity; and the tribal judge's assertion of judicial immunity failed because his status as a tribal judicial officer does not confer immunity against injunctive relief.

United States v. Yakima Tribal Court, ___F.2d___, No. 85-3927 (9th Cir. July 21, 1986). D. J. # 90-2-4-970. Attorneys: Kathleen P. Dewey (FTS 633-4519) and Martin W. Matzen (FTS 633-4426), Land and Natural Resources Division.

INTERIOR'S CALCULATION OF ROYALTIES DUE FROM FEDERAL GAS LEAVE SUSTAINED.

Marathon produces gas from federal lands in Alaska, cools it to liquid form (LNG), and ships the LNG to Japan where it is sold to Japanese public utility customers. Marathon's leases, issued under the Mineral Leasing Act, 30 U.S.C. §181 et seq., require it to pay a royalty of 12 1/2% in amount or value of the production removed or sold from the lease. The applicable Department of the Interior regulation, 30 C.F.R. §206.103, which is incorporated into the leases by reference, provides that the value of production for the purposes of computing royalties will be determined by Interior and that due consideration will be given to the highest prices being paid for production in the same field and to other relevant matters. The regulation, however, further states that "[u]nder no circumstances shall the value of production . . . be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof . . . ."

Marathon challenged the "net-back" orders. The district court entered summary judgment in favor of the government and issued an injunction directing Marathon to calculate and pay royalties by the "netback" method. Marathon Oil Co. v. United States, 604 F. Supp. 1375 (D. Alaska 1985). Marathon appealed the case in the district court, then proceeded to an accounting.

On appeal, the court of appeals first determined that, under the circumstances of this case, its appellate jurisdiction under 28 U.S.C. §1292(a)(1) extends to the order granting summary judgment as well as the injunction per se. Reaching the merits, the Ninth Circuit upheld Interior's orders directing Marathon to calculate and pay royalties pursuant to a "net-back" formula. The court further found that Marathon's objections to certain particulars of the formula were premature pending resolution of the accounting proceedings in the district court. Finally, the court held that there were no disputed issues of material fact barring entry of final judgment.

Marathon Oil Company v. United States, ___F.2d___, No. 85-3800 (9th Cir. July 24, 1986). D. J. # 90-1-18-3738. Attorneys: Robert L. Klarquist (FTS 633-2731), Michael W. Reed (FTS 633-5288), and Jacques B. Gelin (FTS 633-2762), Land and Natural Resources Division.

EPA HAS AUTHORITY TO ISSUE AND ENFORCE ORDER UNDER SECTION 3013 OF THE RESOURCE CONSERVATION AND RECOVERY ACT EVEN WHERE AN EPA-APPROVED STATE PROGRAM IS IN EFFECT.

Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), Sections 3001 et seq., 42 U.S.C. §6921 et seq., authorizes and directs EPA to establish a comprehensive federal program governing the generation, transportation, storage, and disposal of hazardous wastes. Congress further provided in Section 3006 of RCRA, 42 U.S.C. §6926, a mechanism by which a state may, upon EPA approval, administer its own hazardous waste program "in lieu of the [f]ederal program" established pursuant to RCRA and administered by EPA.

Wyckoff Corporation owns and operates two woodpreserving facilities in Washington State, where an EPA-approved state RCRA program is in effect. EPA determined that substantial quantities of hazardous wastes were escaping from these sites into Puget Sound. Pursuant to Section 3013 of RCRA, 42 U.S.C. §6934, EPA directed Wyckoff to conduct monitoring, testing and reporting regarding the hazardous waste problems at the two sites.

The district court denied Wyckoff's motion for a preliminary injunction barring EPA from seeking to implement and enforce the Section 3013 orders. Wyckoff maintained that EPA's Section 3013 authority was part of the "[f]ederal program" which was replaced by the state program under Section 3006.

On appeal, the Ninth Circuit affirmed. The court of appeals, noting that the term "[f]ederal program" was not defined in the definitional provision of the statute, found that EPA's Section 3013 authority to compel monitoring, analysis, and testing, was not intended by Congress to be part of the "[f]ederal program" which is replaced where an EPA-approved state RCRA program is in effect. The court further found that EPA's interpretation of RCRA was a reasonable one and, thus, must be upheld by the courts.

Wyckoff Company v. Environmental Protection Agency, ___F.2d___, No. 85-3518 (9th Cir. Aug. 14, 1986). D. J. # 90-7-1-272. Attorneys: Robert L. Klarquist (FTS 633-2731) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

UNITED STATES ATTORNEYS' OFFICES

GEORGIA, MIDDLE

DISTRICT COURT HOLDS THAT THE UNITED STATES IS ENTITLED TO THE IMMUNITY AFFORDED EMPLOYERS UNDER THE GEORGIA WORKERS' COMPENSATION ACT FROM PARTIES SEEKING CONTRIBUTION OR INDEMNITY FOR PAYMENTS MADE TO AN EMPLOYEE OF THE UNITED STATES.

A civilian aircraft maintenance worker, employed by the United States Air Force at Robins Air Force Base, Georgia, died from injuries sustained in a fall from a maintenance workstand positioned at the tail section of a C-141 aircraft. His survivors filed suit against the manufacturers of the workstand and the corporation hired by the Air Force to maintain the workstand. The insurance companies for the respective defendants in that action eventually settled the claims by paying the survivors. The insurance companies, subrogated to the rights of the manufacturer and maintenance contractor, brought an FTCA action against the United States for indemnity/contribution alleging that the United States had been negligent in inspecting and maintaining the workstand and that such negligence proximately caused the worker's death.

The worker's survivors were also paid benefits under the Federal Employees' Compensation Act (FECA). Following settlement of the claims against the manufacturer and maintenance contractor, the government suspended payments under FECA and made a demand for a refund of a portion of the benefits previously awarded, pursuant to 5 U.S.C. §§ 8131-32.

The United States filed a motion to dismiss, later converted by the court to a motion for summary judgment, contending that because a private party in Georgia would not be liable in a third-party action for contribution and/or indemnity where it has paid worker's compensation benefits, the United States could not be liable in tort to the plaintiffs. Citing Georgia case law, the court held that rights under the Georgia Workers' Compensation Act are not exclusive but must be supplemented by consistent federal and state legislation not found specifically under that Act's provisions. The court, therefore, concluded that it is consistent with the Georgia Workers' Compensation Act that the United States is entitled to the immunity afforded employers under that Act, while at the same time allowing the United States to seek subrogation under 5 U.S.C. §§ 8131-32.

Insurance Company of North America v. United States, ___ F. Supp. ___, No. 85-366-3-MAC (WDO) (M.D. Ga. Sept. 9, 1986). D. J. # 157-19M-474. Attorney: Frank L. Butler, III, Assistant United States Attorney, Middle District of Georgia (FTS 238-0454).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6(e)(2). The Grand Jury. Recording and Disclosure of Proceedings. General Rule of Secrecy.

A subpoena duces tecum, issued to a financial institution for records of two of its customers who were targets of a federal grand jury investigation, included a request that the financial institution not disclose the existence of the subpoena to the customers. After being informed that the financial institution would notify the customers, the government sought a secrecy order from the district court. The court held that it lacked authority to issue the secrecy order because Federal Rules of Criminal Procedure 6(e)(2) prohibits the imposition of an order of secrecy on grand jury witnesses.

In a case of first impression in a federal circuit court, the court of appeals held that Federal Rules of Criminal Procedure 6(e)(2) does not preclude a district court from issuing an order of nondisclosure to a grand jury witness when the government shows a compelling need for secrecy. The congressional intent in approving Rule 6(e)(2), which bans orders of nondisclosure to grand jury witnesses, was to alleviate hardship on grand jury witnesses by permitting disclosure to counsel or to associates. To construe the provisions of Rule 6(e)(2) to give grand jury witnesses unrestricted freedom to communicate the existence of a subpoena would completely undercut the entire purpose to grand jury secrecy. Accordingly, while affirming the district court, the court of appeals remanded for the district court to consider any government motion for reconsideration based on additional evidence.

(Affirmed and remanded.)

Concurrence. Judge McMillian concurring in result only; order of the district court should be affirmed.

In Re Grand Jury Subpoena Duces Tecum, dated January 15, 1986, 797 F.2d 676 (8th Cir. July 29, 1986).

Rule 11. Pleas.

Indictments were returned over a two-year period in the Eastern District of Virginia, the District of South Carolina, and the Eastern District of North Carolina charging a number of defendants with separate drug smuggling and distribution offenses. Defendant was indicted in the Eastern District of Virginia and agreed to plead guilty to a single count in return for a motion to dismiss the remaining eight counts against him and abstention from further prosecution for violations related to those charged in the indictment. After defendant was released from prison he was arrested on two charges of a multi-count indictment in the District of South Carolina that appears to involve the same smuggling operation. Defendant moved in the Eastern District of Virginia for an order to enforce the plea agreement enjoining his prosecution and the court denied this order. Defendant states that the agreement was that the government should not--anywhere or by any prosecutorial force--prosecute him further for violations "arising from" the general investigation that led to the indictment under which he entered his guilty plea under Rule 11. The government states that the agreement was only that he should not be further prosecuted for such violations by (or in) "the Eastern District of Virginia."

The Fourth Circuit held that, according to Rule 11, an ambiguous plea agreement made with the defendant binds federal prosecutors in not only the jurisdiction where it was struck but also in others where he faced charges. Both the court and the defendant understood the provision to preclude further prosecution anywhere, and the prosecutor did nothing to dispel that understanding. Although contractual ambiguities are usually equally chargeable to the parties in the private law context, the same is not true in criminal law, where a plea bargain represents a waiver by the defendant of a constitutional right. Moreover, a prior circuit precedent, United States v. Carter, 454 F.2d 426 (4th Cir. 1972), holds that a plea agreement binds the government as a whole unless the agreement specifically limits its reach. The court vacated the order and remanded for further proceedings.

(Vacated and remanded.)

United States v. Harvey, 791 F.2d 294 (4th Cir. May 22, 1986).

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%
03-14-86	7.06%
04-11-86	6.31%
05-14-86	6.56%
06-06-86	7.03%
07-09-86	6.35%
08-01-86	6.18%
08-29-86	5.63%
09-26-86	5.79%

NOTE: When computing interest at the daily rate, round (5/4) the product (*i.e.*, the amount of interest computed) to the nearest whole cent.

For cumulative list of those federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, *see* *United States Attorneys' Bulletin*, Vol. 34, No. 1, Page 25, January 17, 1986.

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William P. Tyson, Director

Editor-in-Chief: Jason P. Green FTS 633-4024
Editor: Judith C. Campbell FTS 673-6348

TABLE OF CONTENTS

Page

COMMENDATIONS.......... 311

CLEARINGHOUSE

Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors.......... 312

POINTS TO REMEMBER

Attorney Vacancy--Detroit Strike Force.......... 312
Bail Reform Act of 1984.......... 312
Criminal Division--Legislative History and Legal References Units.......... 313
Gun Control Act of 1968 (18 U.S.C., Chapter 44).......... 314
Hobbs Act Approval.......... 314
Personnel.......... 314
Travel Payments Using Diners Club Accounts.......... 315

CASENOTES

OFFICE OF THE SOLICITOR GENERAL.......... 315
CIVIL DIVISION.......... 316
LAND AND NATURAL RESOURCES DIVISION.......... 318
UNITED STATES ATTORNEYS' OFFICES.......... 319

APPENDIX 321

VOL. 34, NO. 13 THIRTY-THIRD YEAR DECEMBER 15, 1986

Please send change of address to Editor, United States Attorneys' Bulletin, Room 1136, Universal Building North, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

COMMENDATIONS

The following Assistant United States Attorneys have been commended:

MARIA T. ARROYO-TABIN (California, Southern) by Director William H. Webster, Federal Bureau of Investigation, for her outstanding prosecution and vital assistance during the investigation of a major South American cocaine-trafficking network.

KATHLEEN M. BRINKMAN (Ohio, Southern) by Director William H. Webster, Federal Bureau of Investigation, for her outstanding efforts in two South American cocaine-trafficking cases.

K. TATE CHAMBERS, GREGORY K. HARRIS, and DAVID E. RISLEY (Illinois, Central) by Postal Inspector-in-Charge L. W. Wiggs, United States Postal Service, for their successful prosecution of a mail fraud case.

PHILLIP G. ESPINOSA (Arizona) by Supervising Senior Resident Agent Richard M. Rogers, Federal Bureau of Investigation, for his successful conclusion of a heinous assault case.

DAVID H. HOFF and PAUL L. KANTER (Illinois, Central) by Forest Supervisor Kenneth D. Henderson, Shawnee National Forest, Department of Agriculture, for their successful handling of a tort claim against the Shawnee National Forest.

NANCY L. HOLLEY (Texas, Southern) by Special Agent-in-Charge Harry M. Sedan, United States Customs Service, and was awarded the United States Customs Service's Certificate of Commendation for her outstanding contributions in support of the United States Customs Fraud Mission.

MATTHEW L. JACOBS (Wisconsin, Eastern) by Elliott E. Lieb, Chief, Criminal Investigation Division, Internal Revenue Service, for his successful efforts in a 26 U.S.C. §7206(1) violations case.

EDWARD L. KNAPP (California, Eastern) by Naval Sea Systems Command Counsel Eugene P. Angrist, Department of the Navy, for his successful resolution of *Aeroject v. Department of the Navy*.

JAMES T. LACEY (Arizona) by Director William H. Webster, Federal Bureau of Investigation, for his major contributions to the successful conclusion of a significant drug case.

VIRGINIA A. MATHIS (Arizona) by State Director D. Dean Bibles, Bureau of Land Management, Department of Interior, for her successful efforts in the prosecution of an Archeological Resources Protection Act case.

KAREN LEE PATTERSON (California, Eastern) by Forest Supervisor Ralph C. Cisco, Lake Tahoe Basin Management Unit, Department of Agriculture, for her outstanding service, advice and support in a difficult situation known as the "64 Acres" in Tahoe City.

PETER B. ROBINSON (California, Northern) by United States District Judge Charles A. Legge, San Francisco, California, for his representation of the government in a difficult prosecutorial situation involving an arson-for-profit scheme.

DAVID I. SHROYER (Ohio, Southern) by Special Agent-in-Charge Terence D. Dinan for his outstanding trial work resulting in the convictions of Steubenville, Ohio, city officials for Hobbs Act violations.

CAROLYN N. SMALL (Indiana, Southern) by Medical Center Director Lawrence C. Stewart, Veterans Administration, for her successful defense of the Veterans Administration and the Post Traumatic Stress Disorder Program.

GEORGE P. WILLIAMS (District of Columbia) by Commander C. Josephson, Chief, Claims and Litigation Division, United States Coast Guard, for his successful conclusion of a challenge to the Coast Guard's federal pilotage regulation.

CLEARINGHOUSE

Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors.

The Organized Crime and Racketeering Section of the Criminal Division has prepared a revised edition of their RICO Manual which provides guidance to federal prosecutors in applying RICO statutes in criminal cases.

Copies of the August 1986 edition may be obtained by contacting the Office of Legal Services at FTS 633-4024. Please request item number CH-43.

(Executive Office)

POINTS TO REMEMBER

Attorney Vacancy-Detroit Strike Force

The Detroit Strike Force has a vacancy for an attorney with prosecutorial experience. Ideal candidates would possess a strong academic background and two to three years experience in the trial of criminal cases. Interested applicants should contact David J. McKeon, Attorney-in-Charge, Detroit Strike Force, on FTS 226-7252.

(Criminal Division)

Bail Reform Act of 1984.

As part of the Bail Reform Act of 1984, Congress provided in 18 U.S.C. §3147 that a court must impose a mandatory enhanced sentence for any federal offense committed by an offender while released pursuant to Chapter 207 of Title 18.

Since that time, the Criminal Division has considered whether an indictment is necessary to initiate a prosecution against a defendant who commits a misdemeanor while on bail. This concern has arisen because the sentence imposed for the misdemeanor combined with the potential one year enhanced sentence required by Section 3147 (because the offender was then on bail) can result in a sentence exceeding one year. Since any offense punishable by a sentence of one year or more is defined as a felony, 18 U.S.C. §1, and all felonies must be charged by indictment, one district court has held that an indictment is required. United States v. Tucker, (No. 86-0864-M, S.D. Cal.). Therefore, to avoid problems, an indictment must be obtained for all misdemeanor offenses if the enhancement provisions of Section 3147 are applicable. This will upgrade the misdemeanor to a felony. The indictment should charge "a felony [a description of the substantive facts] committed in violation of [the substantive statutory citation] and 18 U.S.C. §3147(2)."

(Criminal Division)

Criminal Division--Legislative History and Legal Reference Units.

The Criminal Division, Office of Enforcement Operations, contains a Legislative History Unit and a Legal Reference Unit. Both Units contain vast resources that can be useful to all United States Attorneys' offices and should be utilized to the fullest extent possible.

The Legislative History Unit prepares and maintains histories of those laws enacted by Congress which fall within the jurisdiction of the Criminal Division. It contains histories from 1940 to the present and has histories on major enactments prior to 1940. This Unit's function is to research legislative history or congressional intent for United States Attorneys. The research is started when a request is received and the material is immediately forwarded to the requester. The researchers will try to do the project within your deadline. A list of legislative histories is contained in the United States Attorneys' Manual at 9-1.503. Contact Georgia McNemar, Attorney-in-Charge, or Paralegal Specialist Gladys Tayloe at FTS 724-6657, Legislative History Unit, with your questions.

The Legal Reference Unit maintains and conducts research in the Criminal Division Brief/Memo Bank, a valuable listing of legal memoranda and briefs on criminal matters. The brief/memo bank contains materials that may relate to specific legal or policy questions confronting United States Attorneys. The types of materials collected, indexed, and filed in this system include: (1) Supreme Court and court of appeals briefs; (2) Department and Division orders and directives; (3) speeches or congressional testimony; (4) solicitor general appeal memoranda; (5) division communications or agreements with other government agencies; and (6) miscellaneous materials prepared by United States Attorneys and attorneys in other agencies. The requester should clearly and specifically define the legal issue addressed to enable the researcher to check all the index locations. Copies of the located douments will be sent to the requester. For assistance, contact Georgia McNemar, Attorney-in-Charge, or Paralegal Specialists Elizabeth Murphy and Rebecca Phipps at FTS 724-7184.

To keep the brief/memo bank current, it is requested that copies of briefs and memos discussing law or policy issues be sent to the Office of Enforcement Operations, Room 302, Federal Triangle Building, 315 9th Street, N.W., Washington, D.C. 20530, for inclusion in the bank. With full cooperation from all United States Attorneys, the brief/memo bank will be of more assistance to all its users.

The Legal Reference Unit also provides assistance to United States Attorneys on questions relating to Title 9 of the United States Attorneys' Manual.

(Criminal Division)

Gun Control Act of 1968 (18 U.S.C., Chapter 44)

Effective November 15, 1986, 18 U.S.C. §924(d), as amended by Pub. L. No. 99-308, 100 Stat. 449 (1986), provides that "any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure."

Provisions of the Internal Revenue Code relating to the seizure, forfeiture, and disposition of firearms are applicable. Therefore, firearms and ammunition having an appraisal value exceeding $2,500 must be judicially forfeited by filing an action in the appropriate United States District Court (26 U.S.C. §§7323, 7325, 27 C.F.R. §72.22(b)). Under the provisions of amended Section 924(d), it is essential that judicial forfeiture proceedings be commenced in a timely manner or the seized property may have to be returned either to the person from whom it was seized or his/her delegate.

Please note that this restriction does not apply to the forfeiture of property other than under Section 924(d), e.g., the forfeiture of National Firearms Act weapons pursuant to 26 U.S.C. §5872 is not affected by this restriction.

(Executive Office)

Hobbs Act Approval.

Effective immediately, the Criminal Division's policy against basing Hobbs Act jurisdiction on illegal or illicit commerce is rescinded. The revised policy is as follows:

> The robbery provision of the statute is to be utilized only in instances involving organized crime or wide-ranging schemes. See USAM 9-131.110 infra. The appropriate section of the Criminal Division should be consulted before prosecution is initiated. See USAM 9-131.030, supra.

This policy change affects United States Attorneys' Manual 9-131.040 (B) at page 4, and 9-131.180 at paragraph three, page 27. A USAM bluesheet and a notice of permanent revision are forthcoming.

(Criminal Division)

Personnel.

On November 3, 1986, J. William Roberts was sworn in as the Presidentially-appointed United States Attorney for the Central District of Illinois.

(Executive Office)

Travel Payments Using Diners Club Accounts

Government employees are required to pay all travel expenses incurred in a proper and timely manner pursuant to Section 206 of Executive Order 11222 (dated May 8, 1965) and the Code of Federal Regulations (5 C.F.R. §735.207).

Diners Club accounts are used to cover transportation, subsistence, and other allowable travel and transportation expenses incurred for officially authorized government travel. (*See* DOJ Order OBD 2200.2, dated November 8, 1984.) All accounts are to be paid in full within 25 days of the billing date. Extended or partial payments are *not* permitted. If a charge is disputed, it can be deducted from the amount due, but the remaining balance must be *paid in full*. Accounts which are delinquent 60 days past due will be temporarily suspended by the Diners Club until the receipt of proper payment. A 120-day delinquency results in cancellation of the individual's card.

As a general rule, charges made during one month will not show up on statements until the following month. Since there are 25 days to pay from the date of the statement receipt, the average lapsed time between the date the charges were incurred and the time payment is due will be 50 or 60 days. If travel vouchers are filed promptly, reimbursement for allowable expenses should be received before payments are due to the Diners Club.

If you have any questions, please contact the Financial Management Staff of the Office of Administration and Review at FTS 272-6935.

(Executive Office)

CASENOTES

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A brief amicus curiae in *Hilton v. Braunskill*, No. 86-5204 (3d Cir. 1986). The question presented is whether a district court, ruling on a motion to stay release on habeas corpus pending appeal, may consider the defendant's danger to the community or the likelihood of reversal on appeal.

A brief amicus curiae in *New Orleans Public Service v. City of New Orleans*, 798 F.2d 858 (5th Cir. 1986). The issue is whether, when a public utility sues a local public commission in federal court claiming that the commission's rate-making proceedings violate the "filed rate doctrine," it is appropriate for the federal court to abstain from adjudicating the federal claim.

A petition for certiorari in *United States v. Owens*, 789 F.2d 750 (9th Cir. 1986). The question presented is whether a witnesses' partial memory loss violated Federal Rules of Evidence 801(d)(1)(C) or the defendant's Confrontation Clause rights.

A petition for certiorari in Russioniello v. Olagues, 797 F.2d 1511 (9th Cir. 1986). The issue is whether a federal court may enjoin or declare unconstitutional the conduct of a criminal investigation operated by a United States Attorney.

CIVIL DIVISION

FOURTH CIRCUIT AFFIRMS DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' BIVENS CLAIMS AND STATE TORT CLAIMS AGAINST POSTAL SERVICE OFFICIALS.

Two former Postal Service employees were discharged for filing fraudulent claims for injury compensation. A third former employee was discharged for failure to meet the physical requirements of his mail handler position. All three individuals filed grievances, but their discharges were upheld. They then filed complaints in the district court, raising numerous statutory and constitutional challenges to their discharges. The district court dismissed their complaints. The Fourth Circuit affirmed. Focusing primarily on plaintiffs' Bivens argument, the panel noted that plaintiffs had alternative remedies available to them in the form of (1) grievance procedures pursuant to a collective bargaining agreement; and (2) an administrative remedy under 5 U.S.C. §7501. Because these alternative remedies are available, stated the panel, the decision in Bush v. Lucas precludes plaintiffs from bringing a Bivens action.

Harding v. United States Postal Service, ____ F.2d ____, No. 85-2115 (4th Cir. Oct. 9, 1986). D. J. # 35-84-28. Attorney: John F. Cordes (FTS 633-3388) and E. Roy Hawkens (FTS 633-4331), Civil Division.

FOURTH CIRCUIT VACATES WEST VIRGINIA DISTRICT COURT PRELIMINARY INJUNCTION THAT REQUIRED THE DEPARTMENT OF LABOR TO VIOLATE PERMANENT INJUNCTIONS ISSUED BY UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Two class actions against DOL, brought by a nationwide class of agriculture workers, resulted in the entry of permanent injunctions barring the DOL from certifying foreign workers unless the growers agreed to pay the foreign workers wages as calculated under the regulation as construed by Judge Richey. No growers were sued in those cases; nor did any intervene.

Subsequently, West Virginia growers brought suit, challenging DOL's refusal to certify foreign workers at a rate lower than that ordered by Judge Richey, and alleging that Judge Richey did not have jurisdiction over them and that the injunctions did not bind DOL vis-a-vis the growers. The district court issued a preliminary injunction, and directed the difference in wages be escrowed.

The Fourth Circuit vacated that injunction, ruling that the financial harm to the growers is outweighed by the harm to the Department of Labor, which risked a contempt of court citation before Judge Richey, and to the public interest in the orderly administration of justice, which suffers when coordinate courts issue conflicting orders.

Feller v. Brock, ___F.2d___, No. 85-1912 (4th Cir. Oct. 2, 1986). D. J. # 145-10-3019. Attorneys: William Kanter (FTS 633-1597) and Marc Richman (FTS 633-5735), Civil Division.

FIFTH CIRCUIT RULES THAT PROCEDURAL PROVISIONS OF CIVIL MONETARY PENALTIES LAW CANNOT BE APPLIED RETROACTIVELY.

In the Civil Monetary Penalties Law (CMPL), Congress established an administrative procedure for the imposition of civil penalties and assessments against those who submit false claims in the Medicare and Medicaid programs. In this case, an Administrative Law Judge imposed a fine of $44,000 on a pharmacist for submitting 22 false claims to the Louisiana Medicaid program. The pharmacist challenged the fine on a number of grounds.

The Fifth Circuit vacated the ALJ's decision on the sole ground that the CMPL was applied retroactively. The Secretary had issued regulations prohibiting the retroactive application of the new substantive provisions of the CMPL, but permitting the procedural provisions of the CMPL to be applied retroactively. These regulations permitted an ALJ to impose penalties that were existing under the False Claims Act at the time of the submission of false Medicaid claim through the administrative procedure subsequently established by the CMPL. The Fifth Circuit held that there was insufficient evidence that Congress intended to permit the application of any part of the CMPL retroactively. Thus, the court stated that "[w]hile we applaud both the motives and the legal ingenuity of the Secretary, we cannot allow her to perform 'creative and imaginary statutory surgery' on the CMPL."

Griffon v. HHS, ___F.2d___, No. 85-4733 (5th Cir. Oct. 14, 1986). D. J. # 137-32-392. Attorneys: Anthony J. Steinmeyer (FTS 633-3388) and John Hoyle (FTS 633-3547), Civil Division.

EIGHTH CIRCUIT SUMMARILY AFFIRMS DISTRICT COURT ORDER GRANTING UNITED STATES SUMMARY JUDGMENT IN FORECLOSURE ACTION AGAINST DELINQUENT FmHA BORROWERS.

The government brought this action on behalf of the FmHA to have Clarence and Frances Hopmann ejected from their residence and 2200 acre farm in Arkansas. Although the FmHA had made $400,000 in loans to the Hopmanns that were secured by their farm, it acquired the property at a foreclosure sale after other prior lienholders had foreclosed. The district court granted summary judgment in favor of the government. The Hopmanns appealed and sought a stay of ejection pending appeal from the Eighth Circuit. Their appeal was based on their claim that they were entitled to "homestead protection" under a statute enacted by Congress late in 1985. After the Eighth Circuit had granted a limited stay, the government agreed to consider the Hopmanns' application for homestead protection. They declined to apply, arguing that the FmHA's governing regulations were inconsistent with the statute and that their application had been unfairly prejudged. In their brief as appellants, the Hopmanns asked the court of appeals to consider their challenge to the regulations and to hold that they were eligible for homestead protection. The Eighth Circuit granted our motion for summary affirmance on the grounds that the Hopmanns had failed to exhaust their administrative remedies, and dissolved its prior stay order.

United States v. Hopmann, ___F.2d___, No. 86-1157 (8th Cir. Oct. 9, 1986). D. J. # 77-9-364. Attorneys: Robert Greenspan (FTS 633-5428) and Peter Maier (FTS 633-4052), Civil Division.

NINTH CIRCUIT REVERSES DISTRICT COURT ORDER DIRECTING CUSTOMS SERVICE TO RELEASE PROPERTY TO FORMER PHILIPPINE PRESIDENT FERDINAND MARCOS.

When former Philippine President Marcos arrived in this country, he and his entourage had in their possession various property including, currency, jewelry, and statuary. The Customs Service took possession of the property and, shortly thereafter, the new Philippine government claimed ownership. Mr. Marcos, through his agents, demanded return of the property, but the Customs Service refused because of the conflicting claims of ownership. Mr. Marcos's agents then filed an action for a writ of mandamus seeking to compel the Commissioner of Customs to return the property. The district court ruled for Marcos, and the government obtained an emergency stay from the Ninth Circuit. In a narrowly crafted opinion, the court of appeals reversed. The court held that Marcos had failed to make the required showing for the issuance of mandamus, and found no "clear ministerial duty" to release property under these circumstances.

Azurin v. VonRaab, ___F.2d___, No. 86-2154 (9th Cir. Oct. 29, 1986). D. J. # 54-21-310. Attorneys: John F. Cordes (FTS 633-3388), Nicholas S. Zeppos (FTS 633-5089), and Gregory S. Walden (FTS 633-5713), Civil Division.

LAND AND NATURAL RESOURCES DIVISION

FOREST SERVICE'S INTERPRETATION OF SECTION 6(a) OF ALASKA STATEHOOD ACT AS REQUIRING A COMMUNITY NEXUS FOR STATE SELECTION ENTITLED TO DEFERENCE.

Section 6(a) of the Alaska Statehood Act, enacted in 1958, permits Alaska to select, inter alia, up to 400,000 acres of national forest lands "[f]or the purposes of furthering the development of and expansion of communities, . . . all of which [selections] shall be adjacent to established communities or suitable for prospective community centers and recreational areas."

Alaska filed applications under Section 6(a) for 247,597 acres in the Chugach and Tongass national forests. The Regional Forester disapproved 51,050 acres of those selections because they were not permissible under the terms of the grant. Consistently, the Forest Service has interpreted Section 6(a) to require a "community nexus," that is, a showing that (1) the selected land is either adjacent to an established community or suitable for prospective community centers and recreational areas, and (2) there is a reasonable expectancy that the selected land will actually be used for purposes of furthering the development and expansion of an established or prospective comunity.

On appeal, the Ninth Circuit reversed, strongly emphasizing that the Forest Service's interpretation of Section 6(a) is entitled to deference. The court reviewed the statutory language and legislative history, and concluded that, although the Forest Service's interpretation is not the only possible one, it is nevertheless reasonable. In so doing, the court explicitly approved both the suit-ability requirement and the rule of thumb that land selections be within 25 miles of existing or prospective communities, and remanded the case for a trial on the issue of whether the Forest Service was arbitrary or capricious in the application of its interpretation of the statute to the State's selections.

Alaska v. Block, Secretary of Agriculture, ___F.2d___, No. 85-3992 (9th Cir. Aug. 20, 1986). D. J. # 90-1-4-2360. Attorneys: William B. Lazarus (FTS 633-4168) and David C. Shilton (FTS 633-5580), Land and Natural Resources Division.

LESSOR NOT ENTITLED TO CONSEQUENTIAL DAMAGES FOR LESSEE'S FAILURE TO VACATE AT END OF TERM UNLESS LESSOR SPECIFICALLY COMMUNICATED THIS TO LESSEE AT THE TIME LEASE WAS ENTERED INTO.

The Prudential Insurance Company filed a breach of contract action against the General Services Administration for holding over ten months beyond the fixed term of its commercial lease. The parties stipulated as to actual damages, but Prudential claimed consequential damages resulting from a lost lease for the entire building, which was conditioned on the availability of the one floor rented by GSA. The claims court held that consequential damages were unavailable under a breach of contract theory because the lease contained no explicit duty to vacate, and there was no such implied duty.

The federal circuit affirmed. The court held that there is an implied duty to vacate inherent in every fixed term lease, unless the parties explicitly express a contrary intention. The court affirmed, however, on the ground that consequential damages were not favorable in this case. The court held forseeability is determined as of the time of contract, not breach, and that Prudential had pointed to no evidence in the record to show that potential damages were communicated to GSA at that time.

Prudential Insurance Co. v. United States, ___F.2d___, No. 86-523 (Fed. Cir. Aug. 29, 1986). D. J. # 90-1-23-2509. Attorneys: John T. Stahr (FTS 633-2956) and Martin W. Matzen (FTS 633-4426), Land and Natural Resources Division.

UNITED STATES ATTORNEYS' OFFICES

NORTH CAROLINA, MIDDLE

FOURTH CIRCUIT REVERSES DISTRICT COURT DECISION SUPPRESSING EVIDENCE AND APPLIES THE LEON "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE.

Detectives received two calls from a distraught mother concerning her 16-year-old son living in a house occupied by a "Don or John" where she had personally seen plants being moved in and out and from which her son was reportedly leaving on a drug-buying trip to Mexico. Two officers went to the residence and were refused permission to search. One of the officers went to procure a search warrant. While waiting, the other officer talked to the teenager, who told him of the drugs, their location in the house, and the rental of a vehicle for the trip. The officer independently verified the rental of a vehicle parked in the driveway.

The magistrate refused to issue the warrant initially because of lack of sufficient probable cause. The other officer then went back to the magistrate with the additional information supplied by the youth. The proceedings were under oath but not recorded. The magistrate typed out the affidavit, substituting "informant" for the teenager's name for protection purposes; a search warrant issued. Drugs and a sawed-off shotgun were found in the residence.

The District Court suppressed the shotgun, the subject of the federal indictment, concluding the search warrant affidavit was defective in failing to provide information about the informant's reliability.

Without deciding whether the warrant was issued on a showing of probable cause, the appellate court concluded the evidence seized was admissible under Leon: the officers' conduct in relying on the validity of the affidavit and search warrant was reasonably objective given these circumstances.

United States v. Edwards, 798 F.2d 686 (4th Cir. 1986). Attorneys: John W. Stone, Jr. Assistant United States Attorney (FTS 699-5351) North Carolina, Middle.

ILLINOIS, SOUTHERN

SEVENTH CIRCUIT HOLDS THAT BUREAU OF PRISON REGULATIONS GOVERNING TRANSFERS TO COUNTRY'S MAXIMUM SECURITY PRISON DO NOT INVOKE DUE PROCESS.

Petitioner, an inmate incarcerated at the United States Penitentiary in Marion, Illinois (USP-Marion), brought this habeas corpus action, alleging that the Bureau of Prisons' detailed criteria for placement of inmates at USP-Marion required hearings to determine if inmates were appropriately housed there.

The Court of Appeals for the Seventh Circuit found that the written rules promulgated by the Bureau of Prisons create no entitlements and no right to hearings. Pivotal in this decision is the fact that the rules were not promulgated under the Administrative Procedure Act or published in the Code of Federal Regulations. Thus, rules regarding placement of prisoners at USP-Marion, as well as other institutions, are merely designed to bind Bureau of Prisons staff to the Attorney General's will rather than to create claims of entitlement enforceable by inmates who feel they were misclassified for USP-Marion or the institutions they are housed in.

Miller v. Henman, Warden, United States Penitentiary-Marion, Illinois, No. 86-1035 (7th Cir. Oct. 31, 1986). Attorney: Laura J. Jones, Assistant United States Attorney, Illinois, Southern (FTS 958-6686).

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate
12-20-85	7.57%
01-17-86	7.85%
02-14-86	7.71%
03-14-86	7.06%
04-11-86	6.31%
05-14-86	6.56%
06-06-86	7.03%
07-09-86	6.35%
08-01-86	6.18%
08-29-86	5.63%
09-26-86	5.79%
10-24-86	5.75%

NOTE: When computing interest at the daily rate, round (5/4) the product (*i.e.*, the amount of interest computed) to the nearest whole cent.

For cumulative list of those federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, *see* *United States Attorneys' Bulletin*, Vol. 34, No. 1, Page 25, January 17, 1986.

JURIS DATA BASE LISTING
Revised September 1986

CASELAW

U.S. Supreme Court	178 U.S. (1900) - Slips
** Federal Reporter, 2d Series	216 F.2d (1954) - Slips
** Federal Supplement	254 F.Supp (1966) - Slips
Court of Claims	134 Ct. Cl. - 231 Ct. Cl. (1956 - September 1982)
Claims Court	1 Cl. Ct. (1982) - Slips
Federal Rules Decisions	73 F.R.D. (1976) - Slips
Court of Military Review	1 C.M.R. - 50 C.M.R. (1951-1975)
Military Justice Reporter	1 M.J.R. - Slips (1974 - Present)
Atlantic 2d Reporter	370 A.2d (1977) - Present (D.C. cases only)
Bankruptcy Reporter	1 B.R. (1979) - Slips

SHEPARD'S CITATIONS

United States Reports	1944 - Present
Supreme Court Reporter	1944 - Present
Lawyer's Edition (1st & 2d Series)	1944 - Present
Federal Reporter	1970 - Present
Federal Reporter Second Series	1970 - Present
Federal Supplement	1970 - Present
Federal Rules Decisions	1970 - Present
Court of Claims	1970 - Present
Court Martial Reports	1951 - Present
Military Justice Reporter	1975 - Present

STATLAW - STATUTORY LAW

** Public Laws	93rd - 99th Congress (1-240)
** United States Code	1982 Edition, including Supplement III
** Executive Orders	12/31/47 - 05/24/86
Civil Works Laws	Vols. 1-4 (1790 - 1966) and Selected Public Laws to September, 1983
Comprehensive Crime Control Act of 1984	Pub. L. No. 98-473 (CCCA), Pub. L. No. 98-573 (Tariff Act), Pub. L. No. 98-596 (Fine Enforcement Act) and Criminal Division Handbook on the Comprehensive Crime Control Act of 1984

* New JURIS File
** Major File Additions

DIGEST - WEST HEADNOTES

Supreme Court Reporter	1961 - advance sheets
Federal Reporter, 2d Series	1960 - advance sheets
Federal Supplement	1960 - advance sheets
Federal Rules Decisions	1960 - advance sheets
Regional Reporters (State Cases)	1967 - advance sheets

TAX

U.S. Tax Court Decisions	Vol 1 (9/76) - Slips
U.S. Board of Tax Appeals Decisions	Vols 19 - 47 (2/30-11/42)
Tax Division's Summons Enforcement Decisions	Current to 5/1/84
Tax Division Tax Protester Case List	Latest version
Tax Division New Criminal Tax Manual (Text)	Latest version
Tax Division Criminal Tax Indictment/Information Forms	Latest version

BRIEFS - DEPARTMENT OF JUSTICE BRIEFS

Office of the Solicitor General Briefs	Briefs since the 10/1982 Term
Civil Division Briefs	Selected Appellate Briefs (11/81 - Present)
Civil Division Trial Briefs	Selected Trial Briefs (1977 - Present)
Civil Rights Division Briefs	Selected Appellate Briefs (1/80 - Present)
Land and Natural Resources Division Briefs	Selected Appellate Briefs (12/83 - Present)
U.S. Attorneys' Offices Briefs	Selected Criminal Appellate Briefs (1980-Present)

MANUAL - UNITED STATES ATTORNEYS' MANUAL

** All Titles (1-10)	Latest Paragraph Text

WRKPRDT - DEPARTMENT OF JUSTICE WORK PRODUCTS

Criminal Division Monographs	Selected Monographs
Civil Division Monographs	Selected Monographs
Criminal Division Narcotics Newsletter	July 1979 - Present

LEGHIST - Legislative Histories of Federal Laws

Equal Access to Justice Act (EAJA) Legislative History

ADMIN - ADMINISTRATIVE LAW

** Published Comptroller General Decisions	Vols. 1-65 (1921-Dec. 31, 1985)
** Unpublished Comptroller General Decisions	(1/5/51 - 5/1/86)
Opinions of the Attorney General	Vols. 1-43 (1791-1980)
O.L.C. Memorandums	Vols. 1-5 (1977-1981)
** Board of Contract Appeals	Vols. 56-2 to 85-3 (7/56-10/85)
Federal Labor Relations Authority	Vols. 1-17 (1/79-3/85)
Decisions & Reports on Rulings of the Asst. Sec. of Labor for Labor Management Relations	1 A/SLMR - 8 A/SLMR (1/73-12/78)
Federal Labor Relations Council	Vols. 1-6 (1/70-12/78)
Rulings on Requests of the Asst. Sec. of Labor for Labor Management Relations	Volume 1 (2/70-6/75)
HUD Administrative Law Decisions	Selected Decisions
Merit Systems Protection Board Decisions	(2/79 - present)
Board of Immigration Appeals Decisions	Vols. 1 (1940)-18 (1984) and Slips

REGS - FEDERAL REGULATIONS

** Code of Federal Regulations	1985 Edition, Titles 7, 10, 17-22, 24, 26-50 1986 Edition, Titles 1-6, 8, 9, 11-13, 15, 16, 23, 25
Unified Agenda of Federal Regulations	April, 1986 Edition

TREATIES

Bevans: Treaties and Other International Agreements of the United States	Vols. 1-12 (1776-1949)
United States Treaties and Other International Agreements	Vols. 1-33 (1/50 - 5/83)
Department of Defense Unpublished International Agreements	(6/47 - 1/84)

FOIA - FREEDOM OF INFORMATION ACT

** FOIA Update Newsletter	Vol. 1, No. 1 - Vol. 7, No. 2 (Fall 1979 - Spring 1986)
FOIA Short Guide	FOIA Case List Publication (September 1985 Edition)

INDLAW - INDIAN LAW

Opinions of the Solicitor (Interior)	Vols. 1 and 2 (1917 - 1974)
Ratified Treaties	1778 - 1880
Unratified Treaties	1801 - 1868
Presidential Proclamations	1879 - 1968
Executive Orders and Other Orders Pertaining to Indians	1871 - 1971

REFERENZ - TRAINING AIDS FOR JURIS USERS

JURIS Reference Manual, Parts I - IV	November 1984 Edition

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